IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

---

AIR & LIQUID SYSTEMS CORPORATION, et al.,
Plaintiffs,

vs

Civil Action
No. 11-247

ALLIANZ UNDERWRITERS INSURANCE COMPANY, et al.,

Defendants.

---

Transcript of proceedings held on Wednesday, November 16th, 2011, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Joy Flowers Conti, U.S. District Court Judge.

APPEARANCES:

| | |
|---|---|
| Sally A. Clements | Ace Insurance S.A. N.V.<br>HDI-Gerling Industrie Versicherung AG<br>Portman Insurance Limited<br>QBE Insurance Limited<br>Swiss Re Europe S.A. |
| Thomas E. Birsic<br>David F. McGonigle<br>J. Nicholas Ranjan | Air & Liquid Systems Corporation<br>AMPCO-Pittsburgh Corporation |
| Susan S. Brown<br>Michael Butler | Allianz Underwriters Insurance<br>The American Insurance Company |
| Stefano Calogero | Allstate Insurance Company |
| Michael A. Shiner | Assicurazioni Generali S.P.A.<br>Certain Underwriters at Lloyd's London<br>Equitas Insurance Limited<br>Harper Versicherungs AG<br>Sompo Japan Insurance Inc |

APPEARANCES (Contd.)

| | |
|---|---|
| Michael A. Shiner | Stronghold Insurance Company<br>Tenecom Limited<br>The Dominion Insurance Company |
| William James Rogers<br>Robert P. Siegel | Associated International Insurance Company |
| Robert B. Stein<br>Patrick Hofer | Columbia Casualty Company |
| William P. Shelley | Executive Risk Indemnity Inc.<br>Federal Insurance Company<br>Munich Reinsurance America, Inc. |
| Joseph P. Donley<br>Teresa L. Snider | Faraday Reinsurance Company<br>General Star International Indemnity Limited |
| Keith E. Whitson | First State Insurance Company<br>Twin City Fire Insurance Company |
| William F. Greaney<br>Timothy D. Greszler<br>William Geiger | Howden North American, Inc. |
| Kristan M. Cassidy<br>Dara DeCourcy | Lexington Insurance Company<br>New Hampshire Insurance Company |
| Amy R. Paulus | Old Republic Insurance Company |
| Lawrence A. Nathanson | TIG Insurance Company<br>United States Fire Insurance |

Court Reporter: Shirley Ann Hall, RDR, CRR
6260 U.S. Courthouse
Pittsburgh, PA 15219
(412) 765-0408

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

P R O C E E D I N G S

* * * * *

(In open court.)

THE COURT: Good morning; please be seated.

This is a case management conference in the civil action Air & Liquid Systems Corporation versus Allianz Underwriters Insurance Company at Civil Action No. 11-247.

And it's also the time for a hearing on various motions that have been filed by certain additional Defendants in the 11-247 case, as well as some parallel motions that have been filed in the case of Howden Buffalo, Inc., versus HDI-Gerling Industrie at 09-1014.

So at this stage I'm going to -- because there's so many counsel, just to be careful, if you could just go through and enter your appearance for the record.

MR. GREANEY: Good morning, Your Honor.

William Greaney, counsel for Howden North America, Inc. With me is Tim Greszler of my firm.

MS. CLEMENTS: Good morning, Your Honor.

Sally Clements for Ace European Group, QBE, Swiss Re, Portman Insurance, and HDI-Gerling.

MS. CASSIDY: Good morning, Your Honor.

Kristan Cassidy on behalf of Lexington Insurance Company and the movant, New Hampshire Insurance Company.

MR. BIRSIC: Your Honor, Tom Bursic, David McGonigle

and Nicholas Ranjan all from K&L Gates representing Air & Liquid Systems Corporation.

MR. CALOGERO: Stefano Calogero of Windels Marx representing Allstate Insurance Company.

MR. SHELLEY: William Shelley from Cozen & O'Connor for Executive Risk Indemnity, Inc., and Federal Insurance Company.

MR. DONLEY: Joe Donley, Your Honor, for Faraday Reinsurance Company and General Star; and with me is Teresa Snider from Butler Rubin. She has been admitted pro hac vice, Your Honor.

THE COURT: Thank you.

MR. WHITSON: Keith Whitson, First State Insurance Company. Good morning, Your Honor.

MR. NATHANSON: Good morning, Your Honor.

Larry Nathanson from Siegal & Park. I represent US Fire and TIG Insurance Company.

MS. BROWN: Good morning, Your Honor.

Susan Simpson Brown from Koch & DeMarco, with Michael Butler from Rivkin Radler, and we represent Allianz Underwriters Insurance Company.

MS. DeCOURCY: Good morning, Your Honor. Dara DeCourcy for Lexington Insurance Company and New Hampshire Insurance Company.

MS. PAULUS: Good morning. Amy R. Paulus on behalf

of Old Republic.

MR. ROGERS: William James Rogers; with me is Robert Siegel representing Associated International Insurance Company.

MR. ANDERLE: Good morning, Your Honor. Robert Anderle representing Mt. McKinley Insurance Company from the firm Seeley, Savidge.

MR. STEIN: Your Honor, Robert Stein, Rudov & Stein here in Pittsburgh, local counsel for Columbia Casualty Company. I have principal counsel, Patrick Hofer from Troutman Sanders.

MR. GEIGER: William Geiger, Your Honor, Davies, McFarland & Carroll in Pittsburgh, local counsel for Howden North America.

MR. SHINER: Good morning, Your Honor. Michael Shiner, Tucker Arensberg; and with me is Carolina Salazar from Mendes & Mount representing Certain Underwriters of Lloyd's London, Certain Market Insurance Companies, and Equitas Insurance Limited.

THE COURT: Okay. The first thing I would like to do is do the case management portion so that if any counsel here are not involved in the motions and they wish to leave, they are free to do so. But that way I think it's the most efficient use of everyone's time.

Now, with respect to the ADR process, the parties

have chosen mediation, and that's with Judge Donald O'Connell from Illinois, and the costs will be divided equally by the number of counsel appearing for each separately represented party.

So is that still correct?

MR. BIRSIC: Correct, Your Honor.

THE COURT: Presently there are fifteen parties. Now, who would like to take the laboring oar to be the counsel to coordinate the date, time and location?

MR. BIRSIC: For the mediation, Your Honor?

THE COURT: Yes, for the mediation.

MR. BIRSIC: I believe we have already set that date for the end of January of next year. I believe it's -- we set aside three days at the end of January, beginning on January 25, 26, and 27, before Judge O'Connell.

THE COURT: I'll give you until the 2nd of January to conduct the mediation --

MR. BIRSIC: The 31st, I'm sorry.

THE COURT: The 31st also?

MR. BIRSIC: Yes.

THE COURT: Why don't I give you to -- is February the 1st a week day?

MR. BIRSIC: We're checking, Your Honor.

THE COURT: I'll check, too. I have a calendar up here. If you have a paper one it might be quicker --

Yes; yes, the 1st of February, so I'll give you until February 1 to complete the mediation; and the dates of the mediation again are January --

MR. BIRSIC: January 25, 26 and we've also reserved the 31st. So it's January 25, 26 and then the 31st.

THE COURT: And it's going to be in Illinois?

MR. BIRSIC: In Chicago, Your Honor.

THE COURT: In Chicago, Illinois, okay. Okay.

Now, the parties have submitted a 26(f) report and have indicated in there the dates for amending pleadings or adding additional parties, and I think everyone agrees that date is December 1. Is that still a good date?

MR. BIRSIC: Yes, Your Honor, for Plaintiffs.

THE COURT: Any objections?

Okay, so that's the date for that.

Now, there seems to be some dispute about the date for completion of fact discovery so I'll need to hear a little bit about the parties' positions on that.

MR. BIRSIC: Thank you, Your Honor, if we may speak first on that subject.

THE COURT: Sure.

MR. BIRSIC: It's the Plaintiff's position that all fact discovery should end on March 15, 2012, which is essentially a 120-day period.

THE COURT: Are there people abroad that have to be

deposed?

MR. BIRSIC: I do not believe so.

THE COURT: So it's all domestic discovery.

MR. BIRSIC: So from -- from our standpoint, that would be true.

And we also, Your Honor, have had substantial -- in an effort to provide information in advance of any discovery requests from Defendants, we have also produced a significant amount of information already. We've produced over 8,000 pages of documents including coverage charts, all the insurance policies, the underlying exhaustion information on the other program, the settlement agreements, the consents, erosion reports that we've received from all the underlying insurers, the historical erosion reports from Utica, spreadsheets from the underlying asbestos claims, all of our corporate history documents, underwriting files, carrier notice letters, and a significant amount of information regarding the underlying asbestos claims.

We're also preparing to produce shortly a complete database of all the underlying discovery materials in the underlying cases including corporate designee deposition testimony and a database that refers to all of the underlying cases that have been handled under the coverage in place program that was our agreement that was effectuated with Utica and other insurers.

So, Your Honor, we have already, right out of the gates, produced substantial information that's going to, you know, be part of the discovery in this case, and we just don't see any reason why we should go all the way out into July with the discovery period.

THE COURT: Okay.

MR. GREANEY: For Howden, since we're kind of joint claimants under the policies, we agree with the schedule of the AMPCO entities. I just wanted to emphasize that there are foreign insurers that are on the AMPCO program as well. They are a minority, but Italian and Japanese and Lloyds insurers --

THE COURT: Part of the original Defendant group?

MR. GREANEY: Correct; and there are some foreign insurers over here, although a lot of them are basically part of US Financial Services conglomerates. Our point is in the 2009 action we found out the Hague Convention affords a more streamlined procedure than our court to get the depositions done.

THE COURT: I'm thinking about timing to get things accomplished, that's the only reason I'm asking that.

MR. GREANEY: I guess our point of view, Your Honor, is whatever depositions might be required abroad would be a limited number and could be done within the time frame Mr. Birsic suggests.

MR. CALOGERO: Stefano Calogero, for Allstate.

I think the list of items that counsel for Air & Liquid have reeled off for Your Honor underscores the complexity of the litigation, and I would like to take a step back and state for Allstate, as for almost all of the under insureds here, this is the first time we've been asked to come to the dance here.

There have been cases before Your Honor, at least the 2009 one -- I don't know if Your Honor handled the 2003 one --

THE COURT: I did.

MR. CALOGERO: What has happened is as the coverage chart progresses in time, Air & Liquid has now decided to join this group of AMPCO insurers from 1981 to 1985, I believe. It's a four-year block. And within that four-year block there's significant coverage of towers of insurance of about 100 million. A number of the insureds are in the upper layers. We need to get the information that has been produced so far.

And I say produced so far. It's my understanding that a lot of that information has just come into my office as of yesterday or Monday, and I was out of the office; I haven't even looked at it yet. But things like settlement agreements, exhaustion information, policies. Even though there aren't 35 policies or 40 policies named in this case, as Your Honor

understands from the previous cases, there are a significant number of other policies that we believe need to be reviewed by us, need to be reviewed in the context of the prior settlement agreements.

One of the significant issues in this case is going to be how it is that Air & Liquid is going to be able to reach the layers of the Allstate coverage which was issued by a company called Northbrook since we sit above a tower of ten million dollars in coverage issued by a company called Highlands, which is no longer with us. They are insolvent; they are in liquidation. In order for us to be reached, they have to pay the limits of those policies.

Now, I understand that the position is going to be that that has been paid, that there are payments over a number of years in order to reach us. But that's ten million dollars of defense and indemnity dollars that we're going to have to review.

I am prepared to work very hard with opposition here to get what we can get done, and also we have the ability to walk and chew gum at the same time. We're going to be involved in mediation and we're going to take discovery. But I think it's an unrealistic schedule, and I say that without even knowing what is going to play out before Your Honor shortly after this conference with regard to these motions.

If these motions turn out in a certain way, the case

will be extremely complex and will involve foreign insurers. Even if the motions are granted, the motion to dismiss is granted, we now know that there's significant coverage that we as insurers here are going to need to see.

As we sit here today, Your Honor, I have not received anything from Howden's counsel about any of the claims that they have. I don't know what they --

THE COURT: I guess my problem with that argument would be this case, the '11 case, if you set aside for a minute the motions that have been filed, involves policies from the years 1981 through 1985. The '09 case and the additional Defendants that have raised the motions in the '11 case involve subsequent policy years; so do you need to look at those subsequent years in this case?

MR. CALOGERO: Yes, Your Honor.

THE COURT: Okay.

MR. CALOGERO: Yes, Your Honor, because the question is I don't know what those policies say or how they --

THE COURT: I believe they are the excess policies; and your policies, for the initial Defendants in this '11 case, have to be exhausted first before you move up to the other policies. Maybe I'm mistaken in that.

MR. CALOGERO: Those policies, as I understand it, Your Honor -- and again without having seen the policies or understood this program, these policies were issued to Howden

North America's parent company which is in Scotland, and that they were issued from some time period in the 1990s. So they are not -- they are excess in the same sense we are excess.

But the interaction of those two blocks of coverage has to be explored here. There is a question as to whether or not Howden, having this separate 1991 to '99 coverage, or whatever the years are, has to use those policies first because of certain provisions in our policies which say that we may be excess to certain other policies.

THE COURT: Is there a law to this effect?

MR. CALOGERO: There is -- first of all, there is --

THE COURT: This, unfortunately, will affect the motions that are currently pending, if there's such a relationship.

MR. CALOGERO: I can only say, Your Honor, at this point that while there may not be -- first of all, I don't know what the policies say, but I would take as a general proposition -- and I would go to cases involving property, first point in property coverage. And I believe -- I believe there is case law that says that if you have a first party property policy which specifically insures a specific peril and you have another policy which specifically -- which is not a specific peril but covers general losses, that depending on what's in the general policy's provisions, that the policy with the specific peril must pay first before the general

policy comes in; and, in fact, that general policy acts as an excess or umbrella to the specific peril.

Again, without seeing these policies, I don't know how that plays into this case. But in any event, I think we're entitled to at least look at those policies, see what claims have been submitted to them, and then the question is we've never -- we've never been asked to pay a claim from Howden. We've been advised of claims. So I think that we need to explore, unfortunately, Your Honor, all of the coverages from all of the cases.

Now, what we're asking here is not a significant amount of time. I believe it's 120 to 130 days to complete fact discovery.

THE COURT: It's an extra --

MR. CALOGERO: An extra three or four months, some months and ten days. Given the history of the previous cases, given the settlement agreements that have been in place in those cases -- and, Your Honor, I have looked at those settlement agreements, and I can tell you they are not easy documents to look at. We have to match them up with what has been paid so far, and we need some $20 million in invoices from AMPCO in order to prove that it's time for them to reach us. And I think that's a lot of work, and I'm prepared to do it, but I don't think it can be done by March 15th.

THE COURT: Okay.

MR. CALOGERO: Thank you.

MR. GREANEY: Your Honor, can I say one thing in response --

THE COURT: I would like to hear some of the other parties first. We'll come back to you.

Does anybody else wish to be heard on that, any of the other insurers?

MR. HOFER: Your Honor, would you like me at the lectern?

THE COURT: Yes, come up to the podium, please. You have to speak into the mike so that the court reporter can hear.

MR. HOFER: Thank you, Your Honor. Pat Hofer for Columbia Casualty.

I want to re-emphasize something Mr. Calogero has just said. There are several of us who are completely new to all of these issues. We understand that the policy holders and the Court have been living with these issues for several years. We don't know anything about the underlying cases or the other coverages and the -- the 8,000 pages I believe Mr. Birsic referred to, 7,000 we got Monday; and, actually, they're on a disk, so I haven't even seen them yet.

We need the time to review that material, to even understand what more we need. And I -- when we were seeking nine months, we actually think a year is more reasonable.

We're trying to compromise with the other side and suggest, you know, a split between six months and twelve months in order to attempt to accomplish this review; and we think nine months is an appropriate amount of time to do that.

Thank you.

THE COURT: Thank you.

Does anybody else wish to be heard on that?

I'll hear back from you now.

MR. GREANEY: Thank you, Your Honor.

Could I actually look -- show you something on the chart?

THE COURT: Okay.

MR. GREANEY: The first point I want to make is Mr. Calogero mentioned that they haven't gotten anything from Howden yet. They're going to get a data dump, similar to what Mr. Birsic described, very shortly from us, including all the policy related information, as well as information about Howden's defense costs and claim payments, as well as how they've been allocated to all these policies for purposes of exhausting the underlying layers.

You may find it hard to see, but the cross-hatching shows the substantial erosion, and the green layers which were the layers at issue in the 2003 action -- and the second point I want to make about apportionment is anytime that you have a policy holder alleging under multiple trigger rules that all

these insurers' policies have been triggered and they're jointly and severally liable for the same underlying asbestos claims, you're going to have ancillary allocation, apportionment disputes between and among the insurers who issued these trigger policies or subscribed to them, and that's what Mr. Calogero was referring to; and the law has developed a fairly Byzantine set of rules for resolving those inner insurer allocation and apportionment disputes that are based on other insurance clauses and their policies which provide rules for allocating among insurers.

What we don't agree with on is that doesn't affect each triggered policy's obligation to the policy holder. But he is quite correct that when the same underlying claims trigger all these policies, under an indivisible loss theory of liability, the insurers then assert contribution apportionment claims against one another; and you might have noticed in the pleadings that eight or ten of the insurers on the AMPCO side of the ledger have already asserted cross-claims for apportionment and contribution against these insurers on the HNA only side of the ledger. So I just wanted to clarify that.

THE COURT: Okay.

MR. CALOGERO: I would just reply the words "data dump" and "Byzantine rules" say it all in terms of --

THE COURT: -- the complexities; I understand.

MR. BIRSIC: Several points, if I may. First, every insurer Defendant and I dare say every counsel present here today are highly experienced in asbestos insurance coverage matters; and so what may seem complicated to someone who has no involvement in these matters is far less complicated to those that are part of a -- a very experienced bar.

And these Defendants have been living with asbestos insurance coverage issues for now, what, almost three decades; and so I dare say that, you know, getting policies and looking at them and determining under the existing case law whether you have some arguments on allocation is a legal issue which is not going to take 'til July to sort out, nor is it going to take much if any factual discovery. You get the policies.

In this case, as Your Honor knows, I'm not sure if it would be helpful, but I have some coverage charts that would reflect that all the prior coverage in the prior suit for the most part was a group of insurers that were predominated by Utica, and there was a coverage in place agreement that was produced in April of this year to all Defendants with a substantial number of the policies and substantial information that we voluntarily produced back in April of this year.

Utica has been, you know, managing the underlying claims process, making the allocations, issuing allocation reports. Those allocation reports are, I would submit,

familiar to every Defendant in this courtroom because they are all party to dozens if not hundreds of similar, you know, types of agreements with their own insureds.

And so you get those allocation reports. You know, that's the information that we're relying upon to state that the underlying policies are exhausted and what percentage of those underlying payments were allocated to us under the Highland's policies -- and this is not anything that, while I say it's not uncomplicated, it's not something that, you know, you throw your hands up and say: Oh, my goodness; we -- you know, we've never been involved in a coverage case before. How can we read that settlement agreement and understand it? How can we take the erosion report that Utica has been doing for, you know, years and years and years and possibly understand that? You know?

I just don't -- I think that rings hollow; and I think that, you know, we need some firm deadlines on factual discovery to sort out what discovery is actually going to be taken. I can tell the Court right now we have no intention right now of running overseas to be taking depositions of insurers about, you know, high level insurers. We believe that this can be fully accomplished by highly experienced counsel rolling up their sleeves and getting this done, you know, within 120 days.

Thank you, Your Honor.

THE COURT: The problem for the Court is that, as the two counsel for the insurance companies had spoke today, if they're just getting material today, we're approaching the holiday season, which is problematic for time purposes. So -- and you also have the mediation in January, and I do want people to focus their attention on trying to resolve the cases. And if you may be not going full bore until then, I'm sure you're going to have to do quite a bit of review so you can be prepared for that; but it may not be with the same intensity if there's a failure to settle in terms of saving costs for the various clients.

So at this stage what I'm going to do is I'm going to give you until the end of May, and I think that would give you -- you'll be working towards reviewing -- getting ready for the mediation. You'll have to do a lot of review and preparation for that, and then immediately after that you should turn your full attention to accomplish over those next several months the completion of the fact discovery. And I think with an additional -- essentially two months, you should be able to do it by the end of May.

If you go into July, then you're back into the holidays and the vacation cycles and people are gone, and I think it would benefit everyone to have this fact part done before June 1st so that if there's going to be any expert discovery, we can start getting that scheduled and we can be

moving quickly to try to get the case resolved.

I don't want it to languish. The '09 case took quite a bit of time because of discovery disputes and things like that that we just finally resolved, and I think we're back on track there, but I don't want this case to languish; and so I think we do need to work as hard as possible to accomplish that.

So we will have -- I'll have a requirement that fact discovery be completed by May the 30th of 2012, and that by April 15 any form of discovery for which the civil rules provide a 30-day response period must be served. That would be production of documents, interrogatories, requests for admission; that gives you 30 days for any responses to come in and a couple weeks to work out any problems.

So if we look at the first week in June, we will schedule our conference at the close of fact discovery. June the 1st is -- June the 1st is a Friday; is that good for everyone? Or would you prefer to do it during the midweek if you have to travel to get here? Is there a preference?

Okay. Why don't we have our conference at the close of fact discovery, then, on June the 1st at 10:30 a.m. Okay?

Now, the only other thing I want to take up with you is the responses that you have made to the questions with respect to electronic discovery. And I'm just -- I may be not familiar enough with everything that is going to be produced

and maybe you've all worked together and this is something that's not a problem, but I need to understand that you agree that appropriate search terms may be necessary, but everything is premature.

You're telling me that you haven't focused on electronic discovery and any problems that could arise in that, so can you tell me what the status is? Is this the type of thing that's not really of a significant issue in these type of cases?

MR. McGONIGLE: Your Honor, David McGonigle for the Plaintiffs.

We don't anticipate we'll have significant issues in these cases. There are some electronic things, obviously, with respect to claims, handling and so forth that will be being produced. What we would suggest, if we do have a problem in that regard, that we would -- once we've continued to make the substantial productions that we're making, the parties be directed to sit down and discuss that, if they have a problem, but we don't anticipate there will be.

When we discussed this on the Rule 26(f)conference, which extended over multiple calls, none of the parties anticipated that there would be significant issues in that regard, so that's why we reserved this issue in the report.

THE COURT: How about from the insurers' side?

MR. CALOGERO: I agree, Your Honor, that these are

issues that we can look at once we get documents. I think the question with electronic discovery is what is the form of what you're getting that discovery. So far as I have seen --

THE COURT: It's also how you conduct the search. If you have a gazillion documents and you're going to do a search, there's always issues that come up on how you frame the search, what the search terms are; and I -- and I and the other judges of this court like to have those matters on the table early in the litigation so that it doesn't become an overwhelming problem where you get into extensive fights on things that have already been produced and then there's questions of, well, I didn't know that they were going to do this, and it just can become an expensive problem down the road if it's not addressed early on.

MR. CALOGERO: My only point is -- is that I -- I know that documents have been produced. I understand what they are. I can't say what it is until I see the documents, what search terms we're talking -- what the search terms --

THE COURT: I mean they've already produced electronic documents. The question is if you're going to have another request out to them, you don't think you have everything you need, and then you're going to come and say how did you do the search, how did you find these were the documents -- that's really the type of question.

MR. CALOGERO: Well, again, until I see what they've

produced, I don't know, you know, what else I can ask them. It may very well be that what they've produced is all that I'm ever going to get from them with regard to those particular topics.

THE COURT: Well, what I would like you to do is by January the 15th to file a Supplemental Paragraph 11 from the 26(f) report, and that way I'll know if there's any problems and I can -- then you'll be focused on it and we can try to get those resolved as soon as possible. And by that time you should have looked at things and you'll have a sense about whether there's going to be a problem or not.

Is that a fair assessment?

MR. CALOGERO: I think so, Your Honor.

THE COURT: Okay. So we'll give you until January 15th and then you can file a revised 26(f) Paragraph 11. That's the only paragraph that you've got to modify.

Okay?

MR. McGONIGLE: Thank you, Your Honor.

THE COURT: Okay. I think I've addressed -- is there anything else on the case management side that anyone wishes me to focus on at this stage?

MR. McGONIGLE: Your Honor, if I may, David McGonigle for the Plaintiffs.

We did note in the Rule 26(f) report that we thought

that while discovery did not need to proceed in phases -- this is on Page 7, Your Honor -- that the motions for summary judgment, including motions for partial summary judgments, may be filed during the course of discovery. We're not saying that will necessarily need to happen, but --

THE COURT: This is what I'm going to ask you to do because I have particular requirements with respect to summary judgment motions, whether they're partial or complete. And if you feel that it's -- the time is ripe to file a summary judgment motion, I'm going to ask you to contact the Court's chambers to schedule a hearing on that.

So it can be by telephone call, and I need to know why you think the time is ripe for it because what I don't want to have is to have all these serial summary judgment motions and I still have to have a big summary judgment motion; and it's more efficient if things are orderly.

Now, if there's something that's dispositive for one particular thing that will really help the case move forward, then I would entertain a summary judgment motion, you know, even though fact discovery is not completed. But, typically, I take up the issue of whether there are going to be summary judgment motions at the post fact discovery conference.

So I'm going to ask that if you would like to have summary judgment motions earlier than at the end of fact discovery, that you notify the Court and request a scheduling

conference on that, and then we can do that by phone, if that's most efficient for everyone, and then you can tell me why you think it would be helpful to the case to have it at that -- at this stage. And then I'll -- if I agree with that, then I will enter an order and set the times out and the framework and how I want those motions to be filed.

MR. McGONIGLE: Very good, Your Honor, thank you.

THE COURT: Is that acceptable to everyone?

Okay. Anything else:

MR. NATHANSON: Your Honor, Larry Nathanson.

We also said in the Rule 26(f) report we anticipate sending you a stipulated protective order. We are working on a draft. I think there are a couple issues we're trying to work out; but maybe Mr. McGonigle can confirm, we hope to get you something soon.

THE COURT: Okay.

MR. NATHANSON: It may not be by the end of November, it may be early December.

MR. McGONIGLE: Hopefully it will be shortly. I doubt it would end up in December. We hope to do it shortly. We need to confer with counsel for Howden and we checked with the insurers -- in fact, we had a pre-mediation session yesterday. I won't get into the contents of it, but separately we discussed the stipulated protective order and we'll address that with them.

We've sent the most recent draft to them but have not had a chance, in view of the timing of when our meeting ended and this morning, to finalize that. And I should note, Your Honor, either -- it may be separate with that, we will be exploring with the Defendants a Rule 502 agreement and order.

THE COURT: Okay.

MR. McGONIGLE: Given the sensitive nature of the underlying claims data that we'll be producing and our mutual shared interests in insuring that that data not be produced in a way that affects the privilege waiver as to the underlying claimants that are mutual antagonists, if you will, we will be addressing that with them as well.

THE COURT: So that will be a separate order on that.

MR. McGONIGLE: I believe that will be a separate order because a protective order is almost done. So they could be together, but more likely they'll be separate. And in any event, we'll work to have those in by the end of the month.

THE COURT: Okay. Good.

Anything else on case management?

Okay. Now, we'll move to the next stage. I want to take up the -- first the motions in the '09 case.

MS. CLEMENTS: Your Honor, should I approach at this time on the '09 motion?

THE COURT: If you want to wait a minute, I will give you some issues I want you to address. You may want to take a minute to think about those.

In the '09 case there is a docket entry at ECF No. 283, a second motion to dismiss on forum non conveniens which was filed by HDI-Gerling; and then there was a ECF No. 289, a motion to dismiss or alternatively stay also filed by Howden -- also filed -- excuse me, filed by New Hampshire Insurance -- New Hampshire Insurance Company.

Now, the one issue that I'm really struggling with at this stage is the '09 case has been moving along for several years. There was extensive mediation that took place. There's extensive discovery that has already been -- has taken place. So -- and it's my understanding that that's all come to a close now.

I think all the outstanding issues that were raised -- I had a special discovery master that was brought in. In subsequent following hearings I had sealed a document and I am -- there's a motion for reconsideration on the motion to seal document which I do want to take up at this time. And this was filed, so we can address that as well.

But at this stage, with everything that was coming to a head, so to speak, in terms of all the work that has been done here, this case is going to be ripe. There's a proceeding recently filed by these two Defendants in England,

and now they want to come here and say: Stop everything, everything you've done is for naught, don't move any further.

And I already had a similar forum non conveniens issue raised quite a while ago. That was denied and now it's back again. So I have a question really with respect to New Hampshire about the timeliness of this. I mean isn't it, you know, this kind of action, too late to be filed? And I don't have any robust briefing on that issue from the parties.

And with respect to HDI-Gerling, the Court having already denied it, isn't that really just a motion for reconsideration and that should be judged under the standards for a motion for reconsideration? And that wasn't directly addressed by the parties either.

So those are, you know, some of the threshold issues I have; and I find it very problematic that it's being raised at this late stage in the '09 case with all of the matters that have been undertaken to date in that litigation. So with that I'll turn to you.

MS. CLEMENTS: Your Honor, this motion needed to be filed based on external factors, things beyond our control that have happened in recent times. We have the Faraday action filed in England addressing a policy in the 1998 policy year. That's the same year that we have at issue in the Howden.

In response to that --

THE COURT: So the '98 policy is at issue in the '09 case?

MS. CLEMENTS: In the '09 case, the 1998 first layer excess policy sits just below the Faraday policy that's at issue in England and has just been the subject of a judgment. We also --

THE COURT: It's not really a judgment.

MS. CLEMENTS: That's their nomenclature.

THE COURT: Our parlance --

MS. CLEMENTS: I'm using what it is titled in the court there. In reaction to the Faraday action, we had the Howden North America matter going to the 2011 AMPCO --

THE COURT: Let's forget about the '11 case. Let's look at the '09 case. I think they may turn out to get the same result, but I think there's a -- you know, a significant difference between the postures, given that the '09 case is getting ripe to move to the next stage, which would either be a dispositive motion or set for trial.

MS. CLEMENTS: Your Honor, as an initial matter, we can't really let go of the 2011 matter because it has the same policy year as the Faraday and as the '09 action.

THE COURT: It's a different policy, though, right?

MS. CLEMENTS: Yes, but all following form, as Howden's mentioned. They're all follow form to each other or have the exact same language.

THE COURT: Doesn't that mean the English court got it wrong then? If the follow form -- and this was going to be another question I had, particularly with the '11 case -- if that's the standard and I have all these decisions to be made and it's follow form, and it's first filed here, I've already resolved the issue on forum non conveniens when it was raised. And just because now HDI and New Hampshire want to sidetrack all of this litigation that has gone on and go over to England because they think they're going to get a favorable ruling there -- it just doesn't strike the Court as a proper process.

MS. CLEMENTS: Your Honor, to first address the 2008 -- we are not going to be able to escape the fact that now the 1998 policy is going to be in England. The London court has ruled that that is an appropriate forum and that --

THE COURT: You can have competing forums. I know it's something we try to avoid, but just because England wants to ignore what this court has been doing for years, and if we have a '98 policy that is going to be in play as the forum that is going to follow form over there, and we're ready to get a resolution on those -- on that matter, and that happens to impact here the other policies -- and I have read the -- I have read the decision that was given in the English courts with respect to why they felt that the English law would be appropriate; and I -- I may follow that here or I may say that that's not the case.

But at this stage it strikes the Court that it would be very similar to any situation we would have here in the states. If there's a later filed case that's going to raise issues, that you don't stop everything in the prior case. You know, it really should be that the later case should have deferred -- and maybe these issues weren't fully briefed or apprised to the British court. I'm not sure if the follow form issue was raised and that the court understood that, that we're going to be making decisions here that could affect what they're doing over in England; and maybe they should have stayed it and waited to see what happened here.

But the court in England made its decision, and I have to make an appropriate decision, too. But I just don't -- I can't see that all of the time and effort that has been put into this, when we're ripe and they're just starting over there, why we wouldn't finish. We are a proper -- this court is a proper forum. There is no question about that. So this court has jurisdiction. This court can hear these cases.

So at that posture, I am really struck by what I see as an effort to do an end run around this Court in terms of the work that has already gone on and a decision that I had already made that the forum non conveniens was -- which was considered was denied.

Now, I understand people have dropped out of the case and we're left with HGI and -- HDI and New Hampshire. A

lot of the other parties have settled in the '09 case. But we still are moving ahead in that case. And New Hampshire in particular -- I mean New Hampshire isn't a British entity, it's here, and -- it just strikes the Court as very odd, quite frankly, with respect to the '09 case.

But I'll let you make your arguments. I wanted you to hear the concerns that I had in light of the arguments that were raised in the brief.

MS. CLEMENTS: Thank you, Your Honor.

The Faraday action, hitting the same policy, 1998, plus the later policies on which our client HDI-Gerling also participates, raises one issue.

THE COURT: So you want the later policy to control the earlier policies, is that --

MS. CLEMENTS: Not that they're controlling each other, but that action is out there. And Howden's reaction to that in filing their amended answer in the 2011 action, we have another split of the 1998 case. So now we have HDI-Gerling --

THE COURT: I'll take that up in the '11 case. There may be a need to sever those claims out in the case. I'm talking about the '09 case. Why should I dismiss -- take that drastic action of dismissing an '09 case after everything that's gone on in this court with respect to those policies, considering that the Plaintiff's choice of forum was here,

considering I have already addressed forum non conveniens, denied it; and then, just because a British court years later decides for a later policy, a different -- a similar forum but different policy year based on English interpretation of how they would determine the matter, which I may or may not follow, but -- I don't know why I would defer to the British courts given everything that has happened.

MS. CLEMENTS: Your Honor, the court in England has --

THE COURT: With all due respect to the British, to the court in England.

MS. CLEMENTS: And certainly you see in that opinion the court has also shown some deference to this court.

THE COURT: Yes, but I don't know that they understood the arguments about the prior forum's going to be controlling; and so what they would be doing is essentially trying to strip this court of jurisdiction to hear the pending case that's been here for years.

MS. CLEMENTS: By this point the ruling on either of those policies may not be binding on the other court's determination of those -- of coverage under those policies, so you may actually have conflicting rulings coming out in the same tower; and then obviously leaving the '11 aside, those clients have not had the opportunity in the '09 case to express any positions on those policies, to have any say as to

the ruling on that policy.

And if the position is going to be taken that the 2008 ruling from the '09 action is then going to be somehow binding on the '011 clients of ours, that's an issue that we haven't had an opportunity to be heard on that.

THE COURT: I'm talking about the '09 case now.

MS. CLEMENTS: Yes, yes. Also, the -- there's a serious concern as to the policies that cannot be addressed in the '09 or the 2011 case, and that is the 1999 and later policies.

Now, I know Howden said in their opposition that those -- they're not making a claim under those later policies.

THE COURT: They are going to be judicially estopped from making a claim, at least in the US, based on their representations to the Court.

MS. CLEMENTS: The letter we attached, though, as Exhibit D to my declaration, that very recent letter we received for the clients of the English proceedings, there's a paragraph that says: We will not now and never will seek coverage for these claims. But if you read it very carefully, they're only talking about present and past claims that have not reached those excess layers.

The very next paragraph says, essentially, we haven't made any projections of the future, which is something

we hear constantly. There's no projection as to what the claims are going to hit, what layers, and how fast; and they are not --

THE COURT: Those later policies, don't they pick the UK law?

MS. CLEMENTS: Absolutely.

THE COURT: And that's a big distinction between the other policies, so they're not the same forum.

MS. CLEMENTS: There is certainly going to be another claim at some point on those policies, and they have left themselves open in that letter. They have not given up the claims in the '99 and 2000 policies; and that's the reason our clients felt that we needed this action, to put everything together and resolve those Howden group policies. And that is the English proceedings we have filed over there.

MR. GREANEY: Can I eliminate that strawman once and for all? The English court dismissed two post '99 policies that they tried to bring in on the grounds there is no justiciable case in common seeking coverage.

We expect the same result in the case that Gerling and New Hampshire have filed. We told them eight different ways to Sunday that we are not and will not be seeking coverage under those UK choice of law clause policies.

THE COURT: Even in the future.

MR. GREANEY: Even in the future, okay? So I'm on

record as saying that once and for all. They're out of the mix, just like they're out of the mix in the eyes of the English judge. So everything that AMPCO and Howden are seeking coverage for is right here.

THE COURT: Forever and ever and ever.

MR. GREANEY: Forever and ever and ever is before this Court unless I find some super high level excess policy that nobody has heard of, you know, within this tower.

THE COURT: To your knowledge there are no other policies that would provide coverage for these types of claims --

MR. GREANEY: Correct.

THE COURT: -- that Howden could look to.

MR. GREANEY: Correct, Your Honor. There is a cottage industry of insurance archeologists out there that companies like Howden and AMPCO hire to scour the universe to try and find policies. We've been there and done that. The key point is the 1999 and later policies with UK choice of law clauses are out of the picture. The English court recognized that and we respectfully submit that this Court ought to as well.

MS. CLEMENTS: Your Honor, it is only this week that we have ever heard this position; and, in fact, the motion for leave to file an amended complaint in the '11 case mentioned higher or excess policies that included two excess policies

following form, two -- those underlying policies in the '09 case. They had to have meant upper layer policies in later years. There are no other policies. This is the first we are hearing it. When the English proceedings were filed, it was still our understanding that claims were proceeding.

THE COURT: It's good everybody is here today to get this clarified.

MS. CLEMENTS: I would want to be sure there is some binding way to be sure about that, in both countries there be -- not be another claim.

THE COURT: I don't think I can bind what's going to happen in Britain, but I can certainly take this as judicial estoppel because they're making a representation to this Court.

Do you dispute that?

MR. GREANEY: Not at all, Your Honor.

THE COURT: Okay.

MS. CLEMENTS: If I can continue, in the Faraday court the Court said we'll take statements on the later two policies, to get something that is binding. Even that court has some misgivings whether that is legally binding --

THE COURT: Do you want to prepare a submission to the Court that Howden Buffalo's counsel can sign, and submit it to the Court, where there is a firm acknowledgment in writing that will be docketed in this court that can be clear

to the world?

MS. CLEMENTS: That would certainly be a positive development on a going-forward basis, but it does explain why our clients made the decision they made at the time they made it, that it is just now that we're hearing about this relinquishment of claims, '99 and later. It really is news to us.

THE COURT: Okay. Let's get back to the '09 because those are not at play in that issue. Do you have anything else you want to bring to my attention?

MS. CLEMENTS: Your Honor, as you know, in Windt versus Qwest Communications, you can look at facts as they stand today and the --

THE COURT: The problem I have with HDI is this is a motion for reconsideration. I already decided this motion. I mean this is a problem. I didn't get a lot of robust briefing on this, you know. Can you have serial forum non conveniens, that I have to continually look at different circumstances even up to the time of trial, or maybe you're going to raise it at trial? I mean where does it end?

MS. CLEMENTS: Your Honor, there is no case that looks like this case because this case is extraordinary to have this much going on with the same policy year being split among four different courts. These are extraordinary circumstances, and it was only at this point that we felt --

THE COURT: Four different courts? I thought there was this --

MS. CLEMENTS: Four actions; two actions in London and two actions here. And it is only those extreme circumstances that force us to bring these motions at this time.

We had been proceeding through discovery after that motion was denied the first time and just -- this is the circumstances we're under, and we needed to take this action at this time.

MR. GREANEY: I'm not going to say a whole lot, Your Honor, but I just wanted to point out to you that we in fact did address the law of the case doctrine in some detail in our brief at Pages 10 to 15, and we addressed the correlating rule in the Third Circuit in Lony and other cases that it is wholly inappropriate in most circumstances to give Defendants a redo on a forum non motion when there has been substantial merit-related activity and certainly when discovery has been completed.

And if you would like to look at some of the cases we cited that deal with the law of the case doctrine and the context of forum non motions, they are at Page 12 of our brief.

THE COURT: Do you have any response to those, that case law?

MS. CLEMENTS: I don't know. I don't believe we addressed them in the reply brief. I certainly --

THE COURT: That was my recollection.

MS. CLEMENTS: There's certainly -- the circumstances are completely different and it's not as if we have a month later asked the Court and a month later asked the Court. These are extreme circumstances --

THE COURT: But you're asking the Court after discovery is virtually completed.

MS. CLEMENTS: At that point the discovery that's completed certainly aids all parties in a final resolution of this case no matter what court it ends up being in, and it is definitely not for naught, what has been done to date.

MR. GREANEY: That is plainly not correct. None of the pretrial discovery depositions we have taken are usable in England; we have noticed those --

MS. CLEMENTS: In the discovery that has been done to date in the '09 case, I have found to have been valuable. Even though they do not have the procedure, what has been done can be used.

THE COURT: They can't use it in court to cross examine a witness or -- am I correct in understanding that?

MR. GREANEY: That's certainly what we've been told by our solicitors in the London office. We submitted an affidavit to that effect. They distinguish between the use of

the Hague Convention, for example, to get trial testimony from a witness and discovery depositions; and we've taken all discovery depositions because we are in a US federal court.

MS. CLEMENTS: Your Honor, Howden has tried to paint a picture of England as being a completely inadequate forum --

THE COURT: I'm not finding it is an inadequate form. It is a different forum and there are different procedures and we have done a lot of work to get ready for a US federal trial; and, you know, I just -- I'm just really taken back about how we can unwind all of this just because you want to go to England now, which you think is going to give you a better or more favorable treatment.

MS. CLEMENTS: It isn't even that we believe that the other forum is going to give us a more favorable treatment, because it is our position that English law can be applied in this court. The matter is other policies could not be handled in this court. The '99 and later policies we were left with could not be resolved here because of the choice --

THE COURT: That's not an issue now.

MS. CLEMENTS: At this point now we have a divided tower with the old -- the 2011 case and those clients of ours not being able --

THE COURT: The '99 policy is not in issue. We have judicial estoppel on that. You're going to prepare a statement to be signed verifying that.

MS. CLEMENTS: That was the '99 and later policies. I'm talking about the 1998 tower that has now been split between three actions; and I -- it is really our position that we can have English law apply here. And I believe Your Honor has acknowledged there is a possibility that we can get English law applying to those policies, so it isn't shopping for a choice law. That can be done here. And we had that in our reply brief as well, that courts frequently apply foreign laws in cases in the federal courts.

The matter is you could not get the '99 and later policies addressed in this court, and now we have a split of the 1998 tower among the three cases.

THE COURT: Well, the '99 is not an issue any longer.

MS. CLEMENTS: The 1998, that's the one split. In 2011, in 2009, in Faraday --

THE COURT: What I'm not sure is that the British court understood that when the decisions would be made in the '09 case, they would impact that '98 policy because of the follow form. And I didn't see any reference to that in the decision by Justice Beatson. Did anybody see that or am I overlooking something?

MR. GREANEY: I was at that hearing, Your Honor, so I mean I can -- you know, Justice Beatson was bound by, applied English precedent. He obviously wasn't applying US

precedent which is, to be self-evident, binds this Court. He very definitely viewed the ten percent fragment of one policy subscribed by Faraday as a separate contract that could be divorced from the rest of the program.

I mean there is no question that that's how he viewed it, and that might well be how the English courts view it. But it is manifestly not how the United States, including Third Circuit precedent, views the type of form non program. Not at all.

So he did, in our view, respectfully, disregard the core economic purpose of a follow form insurance program, which is to provide uniform, seamless protection to the policy holder all the way up the chain at each layer of coverage. And since you are already going to interpret and apply the lead lower layers of the tower, your interpretation and application of those policies will necessarily govern and be dispositive of the interpretation of the identical policies higher up because they're not even policies.

THE COURT: Was he apprised of that or did he understand that?

MR. GREANEY: Our barrister tried to apprise him of that, and his view was Faraday didn't know he was signing onto a comprehensive insurance program.

With all due respect, they did. They most certainly did. They don't have a separate policy with their own

language over here. The language is down here. The orange and green which are before you, that's the actual guts and the wording of the policy language. These purple follow on subscribers up here, they don't issue a policy; they just issue an underwriting slip that says "wording as underlined," and they sign on for the ride to various percentages all the way up to 200 million.

So they don't even have their own independent policy language. What they agreed to do is to be bound by the wording and the interpretation that is given to the lead layer down below, which you had before you for two-and-a-half years.

So there's two purposes of that follow form insurance program. The first is it reduces the transaction costs of buying insurance by instead of having to negotiate separately with 30 different underwriters, you just negotiate with the lead underwriter, which in this case was XL -- you may remember XL was before you in the '03 action. They're paying. They're participating in the funding agreements.

So XL structures the program. XL writes the coverage. And then everybody else signs on for percentages all the way up the chain. So the Third Circuit -- the second function of a follow form program is to obtain uniform, seamless coverage all the way up the chain.

The only reason that we brought these policies in before Your Honor is because we want them interpreted

consistently and uniformly and efficiently rather than balkanized piecemeal fashion with different judges on different continents applying different rules and different legal regimes, interpreting them eight different ways to Sunday.

We didn't, what they say, split the tower. We haven't split anything. From the get-go dating back to 2003 every single claim that Howden has made for coverage under every single policy at every single layer impacting every single year has been brought in one forum, this one. Under one judicial roof and before one judge. We're not looking for special favors. We're not looking for special treatment. We know you're going to call it as you see it.

But we can't have -- with this ruinous exposure that we're potentially faced with, these asbestos liabilities that have put 150 companies into bankruptcy, we cannot have a comprehensive program of an identically worded occurrence policy construed ten different ways; we can't do that. We have to have it construed one way by the same judge.

And in the Houbigant case which we cited in our briefs, the Third Circuit made the point that I just made. They said in a follow form program, the high level players agree they will be bound by the interpretation that the Court affords to the lead low-lying policy.

So the bottom line is this: We haven't split

anything. We haven't balkanized anything. We're here looking for justice and consistency and uniformity from one judge. There is balkanization, there's piecemeal litigation, there's increased costs, and there's a risk of inconsistent results going on here, but it's not coming from Howden.

THE COURT: Somebody want to be heard?

UNIDENTIFIED ATTORNEY: I wanted to address the issue of whether the judge addressed it, and it's at Paragraph 72 of his judgment. He found as a matter of English law, while the English court will show all appropriate comity to the Pennsylvania court, the interpretive rulings of the latter with respect to the underlying policy will not create precedent applicable to Faraday.

THE COURT: Which is directly contrary to the law in the Third Circuit. I mean they -- but my problem is I don't see why, because the English law doesn't want to recognize that if I have cases pending here, where I have proper jurisdiction and it would be applied, why would this Court, given two-and-a-half years have passed, extensive discovery has taken place, why would the Court turn it over to the British courts and dismiss this action?

It just doesn't make any -- it just doesn't make any sense in this court.

MS. CLEMENTS: Your Honor, the jurisdiction issue aside, there will still be a choice law determination made in

this case; and with all the contacts that are with these policies, with issuance in pounds, issuance from London brokers on London brokering forums, the London-based insurers, the idea that it's going to be Pennsylvania law applied to these policies, I am just having a very hard time finding any basis for that; and then also I don't understand how --

THE COURT: I think you will find a disagreement with the other -- with the -- with Howden Buffalo on that.

MS. CLEMENTS: I'm sorry?

THE COURT: You'll have a difference of agreement with Howden Buffalo.

Am I correct in that?

MR. GREANEY: You are absolutely correct, Your Honor. I mean, number one, if in fact, as they say in their reply briefs, Pennsylvania conflicts rules are the same as the lex loci contractus approach that's been applied in England, they wouldn't have flown the coop and gone over there and filed these balkanized actions. They would have stayed here and argued Pennsylvania conflicts choice of law rules. I mean that's manifestly clear.

Number two, there probably have been 20 cases -- and I'm not exaggerating -- in the United States involving insurance coverage for mass torts under multiyear multilayer occurrence policies that have applied some variant of the flexible balancing of interest test under Restatements

Section 6 and 188, which was designed to supplant lex loci contractus in American jurisprudence. That's what the drafter's objective was.

All of those cases have applied state law to the -- both foreign and domestic policies. None of them have applied foreign law because of the -- because when you weigh the interests analysis, and you've got purely underlying tort liabilities only in the United States for US insureds, it's virtually a given you're going to end up with state law.

And, finally, just to respond to the statement that of course Pennsylvania law, you know, would result in English law, Faraday in front of the English High Court said in a sworn witness statement: Choice of law rules in England and Pennsylvania differ.

Then their counsel went on to say that Pennsylvania conflicts rules are much broader than the English approach, and they apply lots of other factors besides the contracting factors.

Then he said: The outcome of the choice of law analysis before the Pennsylvania court could well be that the English law is not applied. That's a direct quote.

Then he said: It is plain from my description of the choice of law principles likely to be applied by the Pennsylvania court that it will embark on a wide-ranging analysis of all the issues in dispute and will not apply

choice of law principles similar to those applied by the English court. And then he referred to the Pennsylvania choice of law rules as being based on quote non-English factors, unquote.

So I'm not just saying this to point out that the insureds have said one thing to the Court over there and a directly opposite thing over here. I'm pointing out simply that clearly there are significant differences in the conflict of laws rules applied in the two jurisdictions. And therefore we, you know --

THE COURT: Has there been any US court in this type of coverage litigation where you have this stacking that has applied foreign law to the policy?

MR. GREANEY: I'm not aware of one.

MS. CLEMENTS: Your Honor, I would just like to direct your attention to the CGU matter discussed in the Faraday judgment and that we discussed in our reply brief. And there that court recognized that Ohio used the Restatement factors and that that was identical to English choice of law principles.

If that's the case, then that is identical to Pennsylvania use of Restatement to do choice of law; and I believe -- I can't speak to what Faraday said at the hearing, and I was not at the hearing, and HDI-Gerling was not represented at the hearing in England --

THE COURT: But my question was whether --

MS. CLEMENTS: It is the same choice of law rules in England and here.

MR. GREANEY: They're obviously not the same. The CGU case is an English case; so I mean it doesn't prove/disprove what I said. And, secondly, it involved a discrete event, not a mass tort exposure involving thousands of underlying claims and hundreds of policies issued by US and foreign insurers to the same policy holder. So that really doesn't disprove what I said either.

THE COURT: Is there anything further that you wish to be heard on the '09 issue?

I'm going to hear from New Hampshire.

MS. CLEMENTS: I would like to point to New Hampshire at this point, Your Honor.

MS. CASSIDY: Your Honor, on been half of New Hampshire, we did litigate before you for two years, did just finish the fact discovery in that case, and we did not join Gerling in their motion.

There has been an emerging pattern of conduct by Howden over the past several years that suggests that they prefer to litigate their United Kingdom coverage program on a piecemeal basis. They were before you initially with respect to the primary and umbrella coverage. Then years later they came back vis-a-vis their excess program, but only --

THE COURT: Doesn't that make sense to you? Why would they be suing you if they don't know they've reached their limits to reach the excess levels?

MS. CASSIDY: It is often the case that policy holders will include their entire program at the beginning of the case; and if they wish to resolve how the lower levels will respond, the excess carriers will have the opportunity either to participate in those discussions or, if they would like to be dismissed based on the fact that their policies aren't implicated yet, they would reach an agreement with them that --

THE COURT: Is there a case in controversy? Can they sue you if they don't know if they're going to have a claim against you?

MS. CASSIDY: Depends on the facts of each case. Frequently the excess carriers will enter into an agreement that says we're not implicated yet in terms of our policies in this program. We agree with what deal you will work out; we will follow the same terms if and when you ultimately reach us later.

There was a different way to approach the cases and that was an option and Howden didn't do it. They chose to selectively address their program, first with respect to the primary umbrella coverage and then later, when they did in 2009 turn to the excess program, they only selected six

policies out of the program. Those -- vis-a-vis New Hampshire, those --

THE COURT: Are there more policies?

MS. CASSIDY: There are more policies in this program at the excess level, yes, Your Honor, including --

THE COURT: I thought everything has been brought in now. Is that not the case?

MR. GREANEY: Correct, it has.

MS. CASSIDY: Now it has; but when they first filed it in '09, it wasn't.

THE COURT: Because they were at that one tier. Now they've gotten to another tier, as I understand.

MS. CASSIDY: There we go again; and so suddenly two years later: Oh, shoot, we now would like to add two more policies. And so instead of even attempting to bring them into their own coverage case with their own excess coverage before you, they bring them into a unrelated case that concerns AMPCO and --

THE COURT: We're talking about -- I want to focus on the '09.

MS. CASSIDY: I'm focused on that because our perspective in filing this motion in 2009 is directly related to the course of conduct that we started to see emerge where every so often additional policies would be added to the dispute or into a separate dispute and my client would once

again be forced to come back in a new piece of litigation and handle additional policies.

We learned at or around the time we filed our motion that Faraday had also sought to add additional policies in the excess program not at issue in the '09 action before you, in England. And my client, New Hampshire, participated in all three of those policies. And you've heard a lot of discussion about those already.

THE COURT: Those are the '99 and beyond.

MS. CASSIDY: No, the first Faraday policy is the '98.

THE COURT: Right.

MS. CASSIDY: The second two are '99 and 2000, 2001; and those two policies have the mandatory UK provisions.

THE COURT: And these are not -- there's no claims, so you can rest easy on those.

MS. CASSIDY: That's correct, and we know that now. At the time we filed our motion before you, two years into the discovery process, it was because of this -- this course of conduct by Howden --

THE COURT: But you would have known when they sued you then that you had these other policies. Why weren't you raising it at that time?

MS. CASSIDY: Because their pleadings were clear that those were the policies that were at issue and the only

ones that were going to be implicated. As time went on and because --

THE COURT: So it's just not --

MS. CASSIDY: And the practical result of this conduct, Your Honor, was that we were before you in the '09 action. Three of our policies are now implicated in the Faraday action. As a response to that, Howden put two of the policies into the AMPCO action, and at that point by no choice of my clients we were now involved in three pieces of litigation to try to capture and resolve the Howden excess program.

THE COURT: Don't you think the '11 issue is because the follow form belongs in the '09 case?

MS. CASSIDY: Not necessarily, Your Honor. In light of the fact that the Faraday --

THE COURT: If it's a follow form and we're going to be making decisions about the form in the '09 case, why don't they just come on over to the '011 case? I mean isn't that going to be dispositive of those?

MR. GREANEY: We would be happy to move to consolidate or do exactly what you said. Our objective is to get everything --

THE COURT: The issue -- I want to finish up the '09, and I'm worry about the timing here, the delays that have already taken place, and, you know -- you didn't respond to

those issues either. Did you?

MS. CASSIDY: If I may, Your Honor, I just want to be clear with the Court that this wasn't a tactical maneuver. We were before you for two years. We actively participated in the discovery process and did not have the intention of filing such a motion. We didn't at the beginning.

We did so now not because we wanted to revisit the traditional forum motion that was before you years ago. It was because circumstances have changed dramatically and we're now faced with litigation in England and two case before you --

THE COURT: No, you're not. You're faced with litigation in England because you want to be; you filed the suit over there.

MS. CASSIDY: Only the last suit.

THE COURT: You're the one that chose to go over there. You could be here happily. Buffalo didn't sue in England.

MS. CASSIDY: If I would be happily, I would be happily in the 2009 action, happily not in the 2011 case.

THE COURT: And you want to bring everything over to England after everything has gone on here, and it's quite apparent to the Court that's because there's a perceived advantage because of the law over there. And I don't know, it may be just too late -- at least for the '09.

MS. CASSIDY: Our motion --

THE COURT: I don't -- I mean it just is something that is very problematic to this Court.

MS. CASSIDY: At the time the motion was filed, it was an attempt to consolidate all of the excess policies that could ever be at issue, whether or not Howden would put them at issue now or two years from now, in order that my client can resolve in one action all of the policies at the same time and then go home.

THE COURT: We can do that here, too, though because they have the -- and your case was filed after you were brought into the '11 case here. I mean it's not -- I mean the Faraday situation is a little different, you know, than your situation as New Hampshire.

MS. CASSIDY: And my motion was filed after they brought the additional two policies into the 2011 action because at that point I was now involved in three actions, and when would there be four, when would there be five? We had to figure out a way to stop this type of litigation.

THE COURT: You could have come here; you made a deliberate choice to go over there.

MS. CASSIDY: The deliberate thought was not out of disrespect to this Court. It was because two of the policies in the New Hampshire program mandated that they be litigated in England, and so --

THE COURT: I already heard they will not be pursuing it. I think they told you that beforehand; am I mistaken?

MR. GREANEY: Not mistaken at all, Your Honor; and it's a little bit disingenuous to be hearing that because if they really had an issue as to these post '99 policies, they could have picked up the phone and asked us or they could have brought them in here.

You see, we're not permitted to bring them in here without their consent -- XL of course agreed several years ago -- but they could have done it. So -- and the other point I wanted to make is not only can their rights and obligations be determined comprehensively in the proceedings before this Court, so can everyone else's because you've got 41 policies and 33 insurers before you who are going to have inter-insurer allocation and apportionment disputes.

Not only are AMPCO's rights to coverage on the table and Howden's rights to coverage on the table, but insurers' rights to apportionment.

THE COURT: And that's even if we're only focusing on the policies that Howden Buffalo got in its own right after -- in the '90s.

MR. GREANEY: I don't think it's possible to just focus on the policies.

THE COURT: That's what I'm saying. From what I'm

hearing today, there's still some kind of overlap even from the '80 policies that they need to find out about these '90 policies.

MR. GREANEY: You heard it from Mr. Calogero. It's clear that these insurers always have inter-allocation apportionment disputes among one another in asbestos and other long tail tort claims because they trigger many years' worth of policies.

MS. CASSIDY: Your Honor, that's not true. First of all, to respond, Howden is the Plaintiff. To the extent they seek coverage under policies, I assume that they would bring them in their action. They didn't at the onset and you know -- I've explained to you the reasons why we ultimately had to file the motion based on forum to seek relief.

Turning to the fact that these two programs are integrated and somehow everyone needs to be at the same table is not true. In order to analyze these issues, you have to keep the programs as separate and distinct as they are. The United Kingdom issued an insurance program to Howden.

THE COURT: The United Kingdom?

MS. CASSIDY: We call it the UK program in the lingo of the case.

THE COURT: It's not the United Kingdom.

MS. CASSIDY: It's a term of art we use in the documents we exchange; I apologize.

THE COURT: Okay.

MS. CASSIDY: That policy -- that set of policies was issued from 1995 to 2002 to Howden's parent in England.

THE COURT: In Scotland.

MS. CASSIDY: In the 2009 action Howden seeks relief from the carriers in its own program, its UK program, for the underlying asbestos claims at issue. Separately AMPCO filed litigation against its own carriers and its own coverage program. AMPCO is a separate company, and they too face asbestos liabilities. So the 2011 case before you will resolve those issues on the AMPCO insurance program for AMPCO claims.

They're completely unrelated. The only reason there is overlap is because Howden believes that in addition to its own policies in the UK program, it is also entitled to obtain coverage from the AMPCO program. And so there are --

THE COURT: Isn't that in part because you have some people who are suffering from asbestosis that -- they're suffering throughout all those periods or manifesting later?

MR. GREANEY: The vast majority of claimants, Your Honor -- yes.

THE COURT: Yes, go ahead.

MR. GREANEY: The vast majority of asbestos claimants were exposed to asbestos in the 1950s and 1960s, right back here. By the 1970s, OSHA was coming in and

restricting asbestos in the workplace. You've got these workers; they're all Americans, American tort claimants who inhaled billions and billions of fibers of asbestos in their lungs in the '50s, '60s and '70s. The stuff stays in their lungs, causes -- read the J. France opinion; it's all in there from the Pennsylvania Supreme Court. It causes an immediate inflammatory response. It causes over time the development of fibrosis. It causes genetic mutations. It interferes with cellular growth and ultimately it leads to tumors and asbestosis, you know, now, 2010, 2011.

Because all these policies are occurrence policies, they provide identical occurrence coverage. They are triggered by injury during the policy period. The latent injurious process that is going on in somebody's lungs when fibrosis is developing, according to the multiple trigger law in virtually every United States jurisdiction, is injury.

The reason that you can't segregate out these identical occurrence policies is that they all insure Howden; they're all our policies. It doesn't matter who bought them originally -- and, by the way, Howden Group Limited is no longer our parent. So let me just clarify that. Neither is AMPCO.

It doesn't matter who bought them. They're all our policies. We're insureds under all these policies. They all provide the same occurrence coverage. They are all triggered

by these latent disease claims that progressively develop over time. That's why they can't be segregated out and pulled apart and treated like they're separate programs, because they're not.

And so when we -- when we filed our complaint and we -- in the 2009 and '11 action, we alleged that the AMPCO insurers and these insurers are jointly and severally liable for progressive indivisible asbestos losses. It's a single claim for relief against all of the insurers under all of these policies. It's not a separate and unrelated and independent set of claims against each subscribing insurer. How can we possibly do that given the nature of these disease claims?

And so we're essentially alleging a joint liability on the part of all these insurers under all these triggered policies for all of the underlying asbestos claims. That's not a severable and independent count against each insurance company. It's one count against all of them.

And the Third Circuit said in the Chemical Lehman case when -- although that's a joinder case -- said when you have several insurers alleging a joint -- that are alleged to be jointly liable for a single underlying loss, they ought to be in the same action. So that's our reasoning.

MS. CASSIDY: Your Honor, respectfully, Mr. Greaney's response presumes that he filed in one a choice

of law motion, in this case, and that English law was not applied because the result would not be the same. In addition, however, Howden's claims against its own UK program can be resolved separately.

If it would additionally like to make claims on AMPCO policies because they believe they also have rights under AMPCO policies, they can work that out with AMPCO. And if the AMPCO insurers believe that it is possible that Howden has rights under the policies but that perhaps Howden's own coverage might go first, a priority issue along the lines Mr. Calogero was inferring, well, they can certainly request the production of Howden's policies in the UK program to them in the AMPCO action and they can look at the issue, look at the policies; but they don't need us here for that because this is an entirely separate line of coverage that Howden would like to tap for these claims. And the two programs are separate and they must be kept separate for this analysis.

THE COURT: What I'm going to do is I'll give my ruling on the '09 policy; then we're going to take a break for lunch and come back and take up the '11 policy at -- the motions that have been filed in the 2011 case. And I will be writing an opinion on this because I think it's important also for the English court to understand the Court's decision.

This is very familiar because the Court already had addressed in the -- with respect to the prior motion filed by

Gerling in the '09 case, what the applicable standards were in deciding a motion for forum non conveniens. In Windt v. Qwest Communications International, Inc., 529 F.3d 183, Third Circuit, 2008, the Court of Appeals for the Third Circuit reviewed the appropriate framework to determine whether a dismissal pursuant to a forum non conveniens is proper.

And when -- the Court noted that when considering a motion to dismiss on forum non conveniens grounds, a District Court must first determine whether an adequate alternative forum can entertain the case. If such a forum exists, the District Court must then determine the appropriate amount of deference to be given to the Plaintiff's choice of forum.

Once the District Court has determined the amount of deference due the Plaintiff's choice of forum, the District Court must balance the relevant public and private interest factors. If the balance of these factors indicates that the trial in the chosen forum would result in oppression or vexation to the Defendant out of all proportion to the Plaintiff's convenience, the District Court may in its discretion dismiss the case on forum non conveniens grounds.

And, quite frankly, I think the issues particularly with respect to the private and public interest, given the status of the '09 case, have shifted in favor of the

Plaintiff's choice of forum because there has been a great deal of effort already expended in the discovery and the pace of the case is getting ripe for resolution.

And again like in the prior -- at the prior hearing, I don't -- you know, I'm going to just assume that the British court is an appropriate forum. I mean they've already taken jurisdiction over one of the 1998 policies that is not implicated in the '09 case directly at this stage.

But what the Court has to look at in terms of the private interests are the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of a view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious and inexpensive.

So I think if you're looking at the private interests, you know, you're going to be focusing at the end on what's easy, expeditious and inexpensive. A great deal of expense and time has already gone into the '09 case to get it ready for resolution. This is going to be the easiest and most expeditious way to resolve this case, particularly for the Plaintiffs, when you consider the Plaintiff's convenience.

And the public interest factors look at administrative difficulties flowing from court congestion --

that is not implicated here -- the local interest in having localized controversies decided at home, the interest in having a trial of a diversity case in a forum that is at home with the state law that must govern the case, the avoidance of unnecessary problems in conflicts of law or in the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty.

And when I look at that, you know, the conflicts of law, the British forum has spoken on what law they think would be applied at least with respect to Faraday. But this Court has not had a chance to make that determination. And it may well be that the foreign law does not apply, that the law that would be applicable would be the law of Pennsylvania -- of Pennsylvania. And if that is the case, there is -- it would be inappropriate to dispose of this case at this time, and it would be particularly unfair to the Plaintiff who chose the forum.

And the Court has already decided a forum non conveniens motion previously adversely to one of the Defendants. The other Defendant never raised it until this very late time in the case; and so I see this problem in the conflicts of laws at least with respect to Gerling and HDI as one of their own making.

You know, you're here on this matter, but you've been here for two-and-a-half years. The case has proceeded apace

and we're getting ready for the case to be resolved. And now because you've chosen to file a case in England -- you know, that was your choice and you filed it even after the '11 case was included, the policies that you're most concerned with.

So what I have to balance is all of those interests. Given the forum here, the discovery being substantially completed at this stage, I just can't see that it would be appropriate under all of those circumstances for the Court to dismiss this action or even to stay it, quite frankly, because I think it's appropriate to move forward, to have this resolved; and this is the -- the case has been pending for two-and-a-half years, and it is time to move on and get this to a resolution.

So that would be my ruling with respect to the outstanding motions in the '09 case, and I'll be writing a more robust opinion to address the matters that I've already put on the record.

So we'll take our recess now, and we'll be back here at one o'clock to talk about the '11 case.

(Whereupon, at 12:00 noon, the luncheon recess was taken.)

(In open court.)

THE COURT: Please be seated.

Now we're moving on to the motions that have been filed in the 2011 case. These motions are at ECF No. 265, and

it was filed by Faraday Reinsurance Company; 266, filed by General Star International Indemnity, Limited; 269, motion to dismiss by Ace Insurance and HDI-Gerling; and 273, motion to dismiss by New Hampshire Insurance. So those are the motions that the Court will be addressing here.

And at this stage I think it would be appropriate to take up the Faraday and General Star International Indemnity motions.

MR. DONLEY: Miss Snider will handle the argument with your permission.

THE COURT: Thank you.

MS. SNIDER: May I approach the podium?

THE COURT: We've already had quite a bit of discussion, and we'll have some overlap into this.

MS. SNIDER: I think we will and I will try not to go over ground already covered.

General Star raised a ground that is only pertinent to it which has to do with the fact that its liabilities and assets have been transferred to Faraday Reinsurance Company.

THE COURT: And that's really a question, I think, for this Court in terms of whether I should recognize that. And the objection by Howden Buffalo has been that this is something that's not binding on this Court. So -- why shouldn't the Court give deference to that?

MR. GREANEY: You're asking --

THE COURT: Yes.

MR. GREANEY: Well, because the procedure under which that transfer took place is called a Part 7 procedure. It's a general restructural statute in the United Kingdom. And that -- it's used inside and outside the insurance context for a variety of corporate reorganizations.

But the standard way in which insurance companies who sort of shuffle the deck and move assets around get recognition at the federal level is under Chapter 15 of the US Bankruptcy Code; and they tried that before in a Chapter 7 -- not Faraday, but another insurer in a Chapter 7 case.

And the US Bankruptcy Court for the Southern District of New York, which is what court usually handles all these, denied it and said recognition is inappropriate under federal law because it's inconsistent with the purposes and objectives of the Bankruptcy Code to recognize a reorganization that doesn't have to do with insolvency.

And so they haven't even tried to go through the proscribed route at the federal level to get recognition of this. And since they haven't filed a routine chapter application, then you say: Well, should I recognize it as a matter of state law? And the relevant state laws here would be South Carolina where Howden is based, Delaware where it's incorporated, and Pennsylvania where we are in this case.

All three of those states have a very firm rule that

a unilateral novation of contractual obligations from Insurer A to Insurer B is not valid --

THE COURT: Is this a novation even though it's done by authority of court?

MR. GREANEY: It's a -- in the US it's a statutorily mandated or approved -- not mandated, a statutorily approved novation. We received no notice of it, we received no consideration for it, and we did not consent to it. We did not consent for Faraday to substitute itself as our insurance company. We have rights under our contracts with General Star. They're the ones who subscribed to the ten percent piece of that high level excess policy, not Faraday.

Now, eventually I can see that we're going to have to make a choice because we've got them both in here. The reason we have them both in here is that we don't know who's on first. We don't know anything about this. It's something that happened over in England. It's a transaction that we don't know anything about. We don't know --

THE COURT: They're saying that General Star doesn't have any assets any longer, so there would be sort of like a Pyrrhic victory if you were to get a recovery against them.

MR. GREANEY: Two answers to that, Your Honor. Number one, I would like some discovery to find out if that's true because both General Star and Faraday are owned by the guy in Omaha, Nebraska, that has a lot of money that at the

annual meeting kind of strums on the banjo. I'd like to get discovery to find out who's got the assets, you know, which I can get pretty quickly in this action.

And, secondly -- I forgot what my second point was -- I don't remember what my second point was, but basically I'd like to get some discovery to find out who's got assets before I substitute Faraday for General Star.

THE COURT: It is my understanding Faraday would be acknowledging that it is responsible for all of the liabilities to the extent that they are --

MR. GREANEY: If that's the case, I think that's right; but I think if that's the case, then any judgment we get here against General Star would simply be paid by Faraday because -- I mean once under -- once that transaction is approved under the UK law, that is just going to happen. If we get a judgment here against General Star, then Faraday will pay the judgment.

MS. SNIDER: I don't know what would happen if they got a judgment against General Star here once General Star has dissolved, which is what is in the process of happening. The company is in liquidation. All of its assets have been transferred pursuant to court order; and among the exhibits we attached were the financial statement which showed that all of those assets that had belonged to General Star are now with Faraday.

We simply don't understand the point of proceeding against both here where in England they did not make any argument that a necessary party to the English litigation was missing. So for some purposes they apparently recognize the English Part 7 transfer that was sanctioned by the court there, and for other purposes here they're saying they need both of us -- both of my clients in the action; and we just don't think it's efficient or necessary.

As to the bankruptcy proceeding, in those instances companies were trying to enforce nationwide Part 7 transfers against a multitude of different policy holders. That is not the case here. There are not a multitude of US policy holders for which General Star wrote policies where the company felt any need to go into federal court to have the Part 7 transfer recognized.

There has -- there have been Part 7 transfers recognized in the US. The Sphere Drake Part 7 transfer was recognized by the Bankruptcy Court in the Southern District of New York. So it's not as if they're never recognized.

MR. GREANEY: Can I respond to that?

THE COURT: Okay.

MR. GREANEY: The Sphere Drake is an unpublished, unopposed order which the Southern District Bankruptcy Court enters all the time. It's not a contested proceeding. The Rose case we rely on is a contested proceedings and a

published opinion of the Southern District Bankruptcy Court.

The law is we are not required to accept some barebones balance sheet as a justification for substituting our insurance company for somebody else under the law of some other country. We're entitled at a minimum, I think, to some discovery before we have to make a choice here.

If, in fact, Miss Snider is right and discovery reveals that General Star has absolutely no assets and is going to be wound up and liquidated in the matter of a couple of months, well then obviously that is going to be of some, you know, interest to us in determining, you know, who's on first and who we should go after; but we don't know that yet.

THE COURT: Okay.

MS. SNIDER: The second issue that General Star and Faraday raised was whether or not joinder in this case was improper. This case was brought initially by AMPCO-Pittsburgh and Air & Liquid against their insurers and --

THE COURT: My preliminary assessment would be that the underlying dispute has to do with AMPCO and Howden Buffalo over policies from the years 1981 through 1985 and in terms of who would have coverage under those policies, and then there's suits against various insurers, and that these additional Defendants that are at issue here were sued under a 1988 policy that was issued, you know -- in which AMPCO-Pittsburgh can have no claim because it postdates the transaction.

Now, we heard a lot earlier today about how those earlier policies could be impacted by this availability, but it strikes the Court that with the 2009 case we're looking at the same underlying policy as far as follow form circumstances.

I guess my question is why in this case and why not in the '09 case or why not a totally separate case?

MR. GREANEY: You want us to address -- I mean I can address the factual part of your question, and Mr. Greszler knows a lot more about joinder rules than I do.

THE COURT: Okay. My understanding is under Rule 21 I can sever these claims; I could sever these claims against these additional Defendants, and then it can proceed separately, have its own separate judgment and just move on from there.

MR. GREANEY: Sever them, but not on the forum non conveniens.

THE COURT: Right.

MR. GREANEY: By definition it's a permissive joinder, so it's discretionary; but can I answer the -- can I answer the fact part?

THE COURT: About why it's not in the '09 case and in this case?

MR. GREANEY: Yes.

THE COURT: Yes, I would like to know the answer to

that. Yes, sir.

MR. GREANEY: I don't want to try to, you know, take up too much time on this, but let me back up for a minute because this also links up with Miss Cassidy's complaints earlier --

THE COURT: Can you reduce that to an eight by ten and have it also in color, your chart?

MR. GREANEY: Absolutely. I can actually -- if you want a bigger one, I can do that.

THE COURT: I just think it's helpful to see the different colors.

MR. GREANEY: It's just when you get down to eight by ten, it gets --

THE COURT: Too small?

MR. GREANEY: -- small, --

THE COURT: Yes, sir.

MR. GREANEY: -- tough.

THE COURT: We'll use our discretion maybe. Okay.

MR. GREANEY: Your Honor, this gets to Miss Cassidy's question as well about why -- you know, she said, well, you should have sued everybody all at once. And, you know, here's the problem. Most businesses like to engage in productive business. They don't like to hire lawyers and wage World War III insurance wars for that reason.

If we head back to 2003, sued everybody here, there

would have been a hue and cry like you wouldn't believe from these high level excess carriers to the effect that we're not in play, it's total speculation, this is non-justiciable, you're never going to reach us. So that's one reason we didn't sue them. We sued the first two layers of coverage, as did AMPCO. We did that because we thought that would be enough.

Was it wishful thinking, in hindsight? Yeah, it was. But it was a good faith determination that this would do it. Howden is not clear of when -- about when the asbestos tort liability system -- and it is certainly not clairvoyant about AMPCO's tort liability profile. The vast majority of the erosion that you see on this chart with these cross hatches is AMPCO claim payments -- not over here, but over here -- because AMPCO owns a pump manufacturer that has become a huge target of the asbestos Plaintiff's bar.

We didn't know that in 2003. We didn't know it in 2009 when we started to sue these higher layer carriers to try to fill in gaps that had been created by the erosion of these policies.

Fast forward to 2011. AMPCO hauls off and sues all of its upper level insurance carriers in March. That was a wake-up call to Howden because we had seen in the loss runs from Utica an escalating rate of erosion of these policies and it concerned us; but we thought, you know, it's a couple bad

jury verdicts, things like that. When they brought in all of their high level excess carriers, that sent a loud and clear message to Howden that they were anticipating that this accelerated rate of claim payments by them was going to continue for a long time.

At that point Howden made two decisions. The first decision it made was to -- when AMPCO sued was to post claims against the same insurers because we have rights under the same policy. We said: Geez, if AMPCO is saying that all this is going to be in play, they must know something, so we better get our claims in.

The second decision we made was to get everybody in HNA, not only part of the program into the same mix, because we said if this is going to erode that quickly because of AMPCO claim payments, we're going to need all of these policies as well. So that's why we made the decision.

Before we could get these guys in, Faraday launched its piecemeal action in England, trying to get a quick and dirty ruling that English law applies; and then we responded immediately and brought everybody into the case.

What I'm trying to say is --

THE COURT: Why didn't you bring them into the '09 case?

MR. GREANEY: Good question. The reason that we didn't, Your Honor, is that we thought you'd get mad at us

because we were towards the end of discovery and the case was much further advanced. We weren't concerned about whether they were in the '09 or the '11 case. We were concerned about getting them in comprehensively before the same judge in the same court so that you could uniformly interpret and apply the policies. And we knew that because these policies are not really policies, they're just follow form slips, that whenever you interpreted these low level policies to mean --

THE COURT: Those are the '09 case policies.

MR. GREANEY: Right -- would be binding up the chain automatically. So our reasoning was whether they were in the '11 case or the '09 case really didn't matter because in either event you were ultimately going to construe these low level lead policies; and under basic follow form jurisprudence in the United States, that was going to be binding on these carriers all the way up the chain because that's the program they signed onto. That's the nature of the risk that they took on.

They didn't write their own policies with their own language. They signed on for the ride to what these insurers wrote, and specifically XL. So it didn't -- it seemed to us at the time that it didn't matter which roof it was under, you know, whether it was this side of the room or this side of the room, as long as it was before Your Honor.

What we were looking for was consistency and

uniformity of declaratory relief across all layers of our coverage. And we weren't -- you know, we weren't playing games or trying to, you know, game the system or anything like that.

We don't care if the two cases are consolidated. I mean however you want to do it, we just want it done consistently, you know, across all layers of coverage. That was our thinking at the time.

Does that --

THE COURT: How much discovery would be needed for this additional -- these additional claims?

MR. GREANEY: In my opinion, virtually none because by definition these high level subscribers, they don't have an independent existence from the lead underwriter down below. They don't even have their own policy, so in my opinion there would be virtually no need for discovery.

MS. SNIDER: Your Honor, I think that's a completely wrong statement of the law. Although the Faraday policies contain following form language, that language needs to be interpreted under the law applicable to those particular policies.

THE COURT: You're talking about the policies that are at issue in the '09 litigation?

MS. SNIDER: I'm saying the Faraday policies --

THE COURT: Maybe I'm a little confused here. Is

there really like a separate policy with everything written out or is it just the slip they turn in to say I'm signing up for X amount of excess exposure?

MS. SNIDER: The slip is a separate policy. It contains within it "underlying wording as applicable." The interpretation of that underlying wording has to take place within the context of the particular policy at issue.

For example, Faraday only signed onto three policies, '98, '99 and 2000. The '99 and 2000 policies contain that same language, "underlying wording as applicable," and they contain an explicit provision for English law; and so the wording has to be interpreted under English law.

We submit that the 1998 policy is also governed by English law, and therefore the wording that's applicable to that policy would be interpreted under English law.

MR. GREANEY: Your Honor, do you want to see actually --

THE COURT: Yes, if you have it handy. I know I probably have it here, but it's too hard to find with so many pieces of paper.

MR. GREANEY: You'll note that those are just slips. You'll note the absence of any insuring agreement, the absence of any conditions, the absence of any exclusions. All that policy wording is down below and negotiated by the lead

underwriter, XL.

MS. SNIDER: And incorporated by reference into the policy. Faraday's not a party to the underlying policy; it only insures its policy.

MR. GREANEY: Its ten percent share of the policy.

THE COURT: Can you just walk me through this? Just take a moment. On the first page it lists -- in handwriting it lists the policy number; is this the -- this is not the underlying policy number, this is the --

MR. GREANEY: Correct.

THE COURT: Okay. And then you have the insured, and it's the risk, and then you have another page; but it says it's Page 1 of 1. I mean what is -- what is -- is this something that goes with a cover? What is this?

MR. GREANEY: Tim, you can correct if I'm wrong. I think that's a combination of the slips for all the following form subscribers.

MR. GRESZLER: There are a few endorsements to the policy, I think is what they are.

MS. SNIDER: Correct, there is an endorsement as to the exchange rate that will be used in looking at the limit under the policy.

THE COURT: Okay.

MS. SNIDER: There is an endorsement adding the town of Avon as an additional insured.

THE COURT: Okay.

MS. SNIDER: There is an endorsement adding Chicago Bridge Industries as a named insured with respect to particular exposure. There is an endorsement relating to United Kingdom insurance premium tax.

MR. GREANEY: But those endorsements are in the underlying XL policy, that's the thing. The wording -- the operative wording picks up by reference the wording of the XL policy. There's no credible dispute about that.

THE COURT: Where do you see the ten percent or what they're signing up for?

MR. GRESZLER: Right at the last, I think, two pages there's a series of -- they're called stamps, and the top one says Binter Thor, and that's XL applied percent share.

THE COURT: I'm sorry --

MR. GRESZLER: I think probably the second to the last page --

MS. SNIDER: The General Star stamp is on the very last page, but the endorsements that we were referring to contain this policy number. They do not contain the policy number for the underlying policy. So they're not pages from a different policy that have been inserted into this policy.

MR. GREANEY: I don't think an endorsement adding the town of Avon as an insured has any relevance to what we're talking about in this case.

MR. GRESZLER: To answer your question, Your Honor, the way the London market works, the insured goes out and negotiates with a lead underwriter, who in this case was XL. So if you see -- if you found the page with the stamps, XL is the top stamp.

THE COURT: That's that Binter Thor --

MR. GRESZLER: Yes, meaning XL is the lead carrier. Then you have a series of stamps from other insurers, New Hampshire, Faraday -- that might be it for this policy, I can't remember.

THE COURT: General Star, ten percent.

MR. GRESZLER: Correct. So those are following lines, insurers, who basically just signed on for the ride after the wording had been agreed with with Binter Thor in the underlying policy.

MS. SNIDER: I don't think any of the carriers would agree they signed on for the ride. They signed onto their own policy for their own several liability.

THE COURT: Okay. And is this number, the LD116981998, a unique number for the General Star ten percent?

MS. SNIDER: Correct.

MR. GREANEY: Actually, I think that's -- that describes this high level hundred million dollar policy, and they signed onto ten percent of it.

THE COURT: The high level number is different from

that lower number. I just -- I'm looking at the stamp and it's got a series of letters and numbers.

MR. GRESZLER: That is an internal number that I think each insurer uses for their policies.

THE COURT: So I guess the theory that General -- that General Star/Faraday would have is that they are separate; signing on is a totally separate contract.

MS. SNIDER: That's correct.

THE COURT: And it has nothing to do with the contracts that the other additional Defendants entered into with respect to the same excess coverage.

MS. SNIDER: That's correct.

THE COURT: And that's how the British court -- or the English court looked at this.

MS. SNIDER: That is how the English court looks at it.

THE COURT: Okay. And the position of Howden is that that's not the way the American courts view this.

MR. GREANEY: The position of Howden is it's manifestly not the way an American court would look at it. An American court would look at this as one gigantic policy, led by XL. And the subscribers further up the ladder, all they say is "wording is underlying," and they incorporate by reference that wording.

And as I said this morning, the purpose of this is

to reduce the transaction costs to the policy holder in a subscription market of having to go out and negotiate with 20 different underwriters. You can just deal with one instead, over the policy wording.

But even more importantly, more critically importantly is to assure that that entire 200 million dollar tower will be uniformly construed to the extent possible layer upon layer. In other words, it's supposed to accomplish something.

So you say what is it supposed to accomplish? For a policy holder it's supposed to accomplish seamless, catastrophic loss protection all the way up the chain. And so if each fragment of a subscription way up the chain was construed by different courts applying different laws and different legal rules, the result for the policy holder would be chaos. It would be incoherence. And it would inevitably be balkanization, gaps in coverage, and inconsistent results. All of which, you know, is terrible for a policy holder faced with mass tort liability struggling to secure its insurance asset.

You can't do it unless it's construed holistically. That's the only way you can get meaningful coverage.

Now, maybe we'll win the coverage, maybe we'll lose. But it has to be construed uniformly. It can't be construed gravitationally, pulled apart at the seams, you know. Here's

a piece, send this to the English judge; here's a piece, send to another English judge. Here's a couple more pieces, leave it in front of this court. That is highly detrimental and prejudicial to a policy holder.

And I think as the Third Circuit opinion makes clear, although it's a very short reference, the economic purpose in this country of a follow form insurance program is to assure, among other things, that the high level policies are interpreted in the same way as the underlying lead policy.

MS. SNIDER: I just have two points to make with respect to this. First, this analysis ignores the 1999 and 2000 policies which are related and which call for English law.

This was a policy placed in England by a English broker with English underwriters. And what Howden would like is to say the fortuity of where tort losses may occur is what should govern the interpretation of the policy, and that's not the law in England and that's not the law in Pennsylvania.

Secondly, I wanted to address --

THE COURT: I think their point is when you have these kind of multi-national insurance programs where you have insurance companies from all over the world, different locations, you've got insureds that are going to be all over the world, so you have just a massive number of contacts; that the typical US approach would be that you look at a variety of

factors and it's not -- you're not limited to just looking at where it was negotiated because you have so many places that were looking at this and dealing with these issues. And therefore you're not going to be -- it's not as simple as you would like it to be and as the British court determined it to be.

MS. SNIDER: It's obviously not simple or I wouldn't be here today.

I think their approach, though, is focusing on contacts that don't matter at all to the policy. Pennsylvania has nothing to do with Howden Buffalo. The stock purchase agreement with AMPCO calls for their disputes to be litigated here and they're attempting to take advantage of this forum to have the Pennsylvania choice of law when there's absolutely no relationship between Pennsylvania, the insurance policy, and the parties to that policy.

And so this comprehensive program is not, in fact, what everyone signed onto. People signed onto individual policies. And I think the sanctity of contract is something that is needed to be considered in looking at what parties' obligations are under the contracts they entered into, not under contracts other people entered into.

THE COURT: The problem is when you have this type of program where you have follow form policy, you have to -- there's always an underlying policy. And the point that the

Plaintiff is making here is that we have lots of players in the underlying policies and the various levels, but it's all the same kind of policy language and it would be inappropriate to have different courts applying different laws. And they're already here for the 2000 and 2009 case where they've had it play other policy years with exactly the same language.

MS. SNIDER: And they are here with respect to the 2009 litigation, which Faraday was not joined in; and which brings me to the little bit of creative timeline that they used when they were explaining why they didn't add the two 1998 policies that are now part of the 2011 litigation to the 2009 litigation.

Howden provided a precautionary notice of claims to Faraday in August of 2010 under the 1999 and the 2000 policy, subsequently clarified that it meant it was giving precautionary notice of claims under the 1998 policy as well. That was in 2010.

In 2011 AMPCO filed this litigation. I think it was April of 2011 Howden filed its answer. It did not add any additional policies until after Faraday instituted its action in England. So somehow between April and June when it asked permission to amend its answer in this case it learned supposedly of the fact that the policies were going to be perhaps implicated.

That timing does not make sense to me at all and

seems to be contradicted by their answer in April and the fact that they have admitted that they only added the 1998 policies in response to Faraday's action in London.

THE COURT: That's the only thing that really bothers me about the Faraday issue, is that Faraday -- I don't think there's anything wrong with them going to the court in England to seek relief; and that court has -- has started to review the issues that have been raised and have made some preliminary assessments as to applicable law and that type of thing, although I understand there's likely to be or has been an appeal filed.

So, you know, that's really a problem and what should this Court do under those circumstances?

MR. GREANEY: Well, I think the law -- first of all, let me just -- the statement that we sent out a precautionary notice letter, I mean Howden like any prudent insured, you know, wanted to keep all of its carriers abreast of the development. We didn't make a claim of coverage against Faraday in 2010 or any of these excess policies.

AMPCO didn't serve us until March with its action. We responded initially by cross-claiming against these other insurers and then promptly thereafter we did try to make the action as comprehensive as possible by bringing in everybody else. I don't know what's so unusual about that timing.

In terms of the English court, you know, they

basically responded -- the first time in my career an insurance company responded to a precautionary notice letter by hauling off and filing a lawsuit, and then they wait six months before they even serve it, trying to sort of bleed information out of us.

The law in this Circuit -- and, really, I think in all circuits -- is that the pendency of a parallel action in a foreign country does not warrant the federal court from dispensing with its virtually unflagging obligation to exercise jurisdiction over cases that are before it.

That principle applies with particular force in a case like this where the action that you have before you is far more comprehensive in scope, far more comprehensive in scope than the little fraction of an action before that English judge which involves a ten percent piece of one high level excess policy out of the 41 policies that you have before you.

So what sense would it make under those circumstances to try to sever out and defer -- even if the law permitted you to do that -- to an English judge on a ten percent fractional share of one little subscription to a policy when the whole rest of the dispute is in front of you?

You're going to decide it. You're going to be in a position to issue clear, consistent, uniform, declaratory relief that comprehensively resolves the rights and

obligations of 33 insurers and two policy holders in one uniform action; and that also resolves the apportionment disputes between and among the insurers that have already erupted in response to our and AMPCO's claims in a single action.

Remember there's a very strong judicial policy in the United States in favor of inclusive dispute resolution, especially in complex multiyear, multilayer insurance disputes where the policy holder is struggling with very significant and potentially large scale mass tort liability that has driven a lot of them into bankruptcy and is seeking a forum that can -- that it can tether all the claims to so that it could get clarity and uniformity of interpretation.

We cited the General Reed case from the Second Circuit. We cited the Foremost McKesson case from the First Circuit. We cited the Sumy case from the Third Circuit which basically said ordinarily, you know, you ought to resolve these cases under a single roof. That's US public policy, as is the deference to a Plaintiff's choice of forum and the general unwillingness to allow a US policy holder seeking a comprehensive resolution of its rights and obligations in the US court to even in part be kicked out of the United States court at the behest of foreign insurers and sent packing to a foreign jurisdiction.

So the general rule is that the actions proceed

concurrently unless and until one becomes res judicata of the other. And --

THE COURT: So if the English court would make its decision and it becomes final, then that would be res judicata over here?

MR. GREANEY: Not necessarily.

THE COURT: So it will be a race, is that what you're saying?

MR. GREANEY: It will be a race; but keep in mind -- here's another point that I should have made and didn't. Faraday's seeking very limited relief compared --

THE COURT: I did note that.

MR. GREANEY: All they're asking for is a preemptive ruling on their English conflicts laws, that English law applies to the policy, because they think that they're not going to get that result under Pennsylvania's more flexible nuance conflict of law approach. They're not asking the English court to issue all these rulings on coverage issues.

Remember that our claims against them in this case raise a whole host of substantive coverage issues, not just choice of law. You know, trigger allocation, apportionment, are defense costs covered, what's the impact of the asbestos funding agreement on the exhaustion of the underlying coverage, how do you determine whether and when the underlying coverage is exhausted, the reasonableness of our indemnity

payments and settlement strategy, the reasonableness of our defense costs, number of occurrences, and on and on.

Those issues are all here. They're not at issue in the Faraday action, and that's an additional reason why it would be in our view respectfully improper for the court to just ice that little fraction of the case or defer to the English court; because while the actions are concurrent, they're not really parallel and identical. The relief sought is not the same.

THE COURT: Can I just stop you for just one minute? I have to do a detention hearing at two o'clock that's going to last about an hour. Are you able to return after that or do you have -- everybody have flights?

MR. GREANEY: We'll do what you want us to do.

MS. SNIDER: Happy to change my flight.

THE COURT: Is that okay? If we can finish at least the argument portion of this today, that would eliminate the need to come back at another time. But I do have to take the detention hearing because the individual is being detained and I need to get that resolved. Okay?

MS. SNIDER: Your Honor, the only other point I wanted to make about Faraday, that you had said, well, if there's going to be a race to judgment, what's going to happen? What's going to happen, I think, is revealed by the Third Circuit precedent in cases like RayTech and the Murphy

Teva case in the federal court in Delaware. They're going to come here waving a judgment if they get it first saying you've got to follow what English law applies.

But whether that sort of preclusive effect is appropriate under Third Circuit precedent would depend upon whether you determine that the issue litigated in England was substantially the same as the one before you. And under Third Circuit precedent, an issue is the same only if the legal standard that is applied to resolve the issue is substantially similar. And the legal standard that the English court is applying is a rather extreme version of lex loci contractus which has been discredited as a choice of law rule in Pennsylvania.

The legal standard that applies here is a multifactor flexible balancing of interest test set forth in the Restatement 188, Restatement Section 6, which requires you to weigh a whole bunch of factors against substantive public policies and interests of England and Pennsylvania and the Restatement goals of, you know, predictability and uniformity of result and all those other things to come up with a determination of what law on balance is most intimately connected with the outcome of the dispute.

So it's our view that anything the English court does is not going to be issue preclusive. You will still have to engage in that weighing analysis. And it may well be that

if you decide it on the basis of that weighing analysis, that English law applies under Pennsylvania conflict law. You could defer to the English court because he may know about English law. But we don't think it's going to get to that point. We think the Pennsylvania conflicts analysis is not going to yield English law.

THE COURT: Okay. We'll be at recess, and I think it's going to be in here before three o'clock because one of the counsel for the Government has to leave at three, so I think I'm really comfortable in saying we'll reconvene as shortly after three as possible. Okay.

(Recess taken.)

(In open court; hearing resumed.)

THE COURT: Okay, we were on the Faraday motion at the conclusion, just before the break. At this time is there anything further that anyone wishes to be heard on with respect to that, the Faraday motion?

MS. SNIDER: I just have a few last points to make.

THE COURT: Okay.

MS. SNIDER: Before we took the break, counsel was discussing choice of law. And Faraday believes that the choice of law made in the English proceeding will have preclusive effect here, but that it is not necessary for the Court to decide what preclusive effect it would have at this stage of any proceeding.

Secondly, with respect to the General Star issue, if Howden is making a claim against General Star on the basis that the Part 7 transfer is not binding on Howden, then there is no basis on which it can make a claim against Faraday under that same Part 7 transfer.

And, finally, the Court should interpret each policy according to the terms of that policy and the law that applies to it, whether that law is contained as a choice of law within the policy or the Court decides in the absence of such a choice of law what the applicable law is.

So the policy holder who is interested in having a particular law applied to its coverage and throughout an entire series of policies has an option that it can make if it wants certainty, which is to include a choice of law as was done in the '99 and 2000 policies where English law was explicitly chosen.

Thank you, Your Honor.

MR. GREANEY: May I say just a couple of quick things?

THE COURT: Okay.

MR. GREANEY: The Court has jurisdiction over this case in its entirety. The general rule is that the Court has a virtually unflagging obligation -- that's Supreme Court words, not mine -- obligation to exercise its jurisdiction notwithstanding the pendency of a piecemeal action in another

country unless and until one becomes res judicata of the other one, which hasn't happened here.

Second, as I said before, the relief sought in the Faraday action is much narrower than the relief that we're seeking here.

Third, there's a case, Direct TV, Inc., versus Leto, L-E-T-O, a Third Circuit case, 467 F.3d 842. That case holds among other things that claims should not be abated or dismissed under Rule 21 if they prejudice any substantial right of the Plaintiff.

Our position would be that severing out Faraday here would in fact prejudice a substantial right of Howden by creating the pretty severe potential for an inconsistent judgment and gaps in coverage that we spoke about earlier.

And, finally, I wanted to point out that the first in time rule doesn't apply when actions have been filed and served very close in time to one another; and we cited cases in our brief at Page 15, Note 7 that emphasize that.

In that situation the focus of the federal court needs to be on which of the two courts can provide the more comprehensive relief; and in our view that isn't a close question here.

THE COURT: Okay. How long would it take you to do the discovery that you need to make a determination about whether to proceed against Faraday or General Star?

MR. GREANEY: Part would depend upon the degree of cooperation we got. I mean if we hear these arguments about, you know, non-party witnesses and all that, it might take 60 to 90 days. If we get total cooperation, 30 to 60 days.

THE COURT: Is that going to be a problem with the cooperation? I mean if it's clear that General Star has no assets and everything is gone, you know, that's the easiest way to resolve that issue.

MS. SNIDER: I understood that the Court was only asking about discovery with respect to General Star's transfer of liability --

THE COURT: Yes, yes.

MS. SNIDER: I would think that could be done very rapidly. We've attached the financial statements which show the exact amounts of those transfers. We could discuss with counsel what more they need to see.

MR. GREANEY: We probably would like a 30(b)(6) deposition.

THE COURT: They may not have any officers left to give you one.

MR. GREANEY: I think -- our understanding is that they do.

THE COURT: Okay.

MS. SNIDER: I don't know whether they do or not. I know liquidators have been appointed.

MR. GREANEY: We'd be happy to take the deposition of a liquidator. They tend to know a lot.

THE COURT: Okay.

Well, this is the most difficult of all the matters that the Court has to deal with today, and that is because Faraday was not involved in the '09 case unlike the other Defendants who raised the issue. Faraday did bring a case prior to the third party complaint being filed against them in the 2011 case, so -- and the decision, although it's not a final decision on the merits, it is a decision that deals with some issues that would be of significance in the resolution of this case, of the two cases that are before the Court.

But when I put that aside and I'm persuaded by this concern over the follow form policy and that to the extent that this is a form that is going to be followed, that the policy in issue in the litigation against Faraday and General Star involve the -- involve the same policy in terms of the language that is at issue in the 2009 case, it just makes sense to the Court that that issue would be resolved in this court, and so that you can have consistency of decision making, and that it would be economical and efficient because those policies have already been -- the policies at issue -- the 2009 litigation discovery is already completed with those.

So while there may be some follow-up matters that have to be attended to, the bulk of the discovery has been

done. Albeit Faraday and/or General Star will need to have access to all of that, and they may need to retake some to the extent they feel the need to. So that's not as simple, I think, as Howden Buffalo would portray it here because unlike the other Defendants, this -- these two Defendants were not privy to the litigation and were not participants in the discovery with respect to the 2009 case.

But when I look at this overall and being mindful of the concerns for consistent interpretation of the same policies, although it's somewhat more of -- it is a close question for the Court. I would find that the dismissal is not warranted.

On the other hand, I think a severance would be appropriate. It doesn't have anything to do with AMPCO-Pittsburgh, and the underlying litigation in the 2011 case has to do mainly with Howden Buffalo and AMPCO-Pittsburgh who are going to be divvying up the insurance that is at issue for the policies of 1981 through 1985. And so while there may be some relationship, it's more tangential and it would be more appropriate I think to sever that matter.

And now I need to consider whether it should be consolidated with the 2009 case or just proceed separately, so I'll hear from the parties on that.

MS. SNIDER: At this stage of the case I understand that fact discovery is completed in the 2009 litigation,

they're in the midst of expert discovery. We haven't had a chance to review a single document relating to that case, and I haven't had an opportunity to speak with my client about their preferences with respect to how to proceed. I don't think we would want to be on the same time schedule as the 2009 action.

THE COURT: Okay. So I think it would be more appropriate just to have another case; and if you catch up quickly enough, we can consolidate it and make it more efficient in the one case. But I think it will have to be severed.

MR. GREANEY: May I make one other comment, Your Honor?

THE COURT: Yes.

MR. GREANEY: Recognizing that these cases have proceeded on somewhat, you know, different time periods, the -- there's an inevitability about apportionment disputes that are going to impact the AMPCO/Howden policies and the Howden only policies. Because --

THE COURT: I think that's another factor that I neglected to mention, that I took into account that there are -- there will be a need for discovery, cross discovery that will impact on these various cases.

MR. GREANEY: And perhaps we don't need to decide it today, but a mechanism is going to have to be found --

THE COURT: I think we can jointly administer the cases so you can make it more efficient for all the parties. I don't think that's a particularly difficult thing to accomplish.

MR. GREANEY: Okay, maybe I'm just sort of --

THE COURT: We can have a motion, if everybody wants to consider that, for joining the administration so everybody knows whatever is going on in all the other cases. Is that helpful?

MR. GREANEY: I think I'm going to talk to AMPCO. We may want to do that because obviously the availability of coverage under the Howden only policy will impact how much coverage AMPCO has at the end of the day under their program. If we don't have coverage, then we're going to go after the same Howden policies, so it all kind of jumbles together.

THE COURT: Well, if you think they should all be consolidated, that's a different issue; but we do have different time tables in the cases and we are pretty well under way with the 2009 case.

MR. GREANEY: I understand. I'm just raising it as an issue that's out there.

MS. CLEMENTS: Your Honor, as part of the logistics, but the clients I have that are not HDI-Gerling -- of course HDI-Gerling is in the 2009 case and has had the opportunity to go through the discovery and take its discovery that it wanted

to in that case; but with four other clients, if they're in a severed case and there's a ruling on the '98 policy in the '09 case, is it now going to be issue preclusion and they've never had any opportunity to take discovery and be involved in the rulings that will come down on those policies?

THE COURT: The only person that would be precluded from re-litigating it would be Howden Buffalo, you know. If somebody is not a party to the prior litigation, I don't think they're bound by it. But if it's adverse to Howden Buffalo, they would reap the benefit of that.

MS. CLEMENTS: We would have some concerns as to the comments that have been made about the follow form policies, that if a lower layer policy has a ruling in the '09 case, it essentially ties the hands and precludes them from making any arguments in the '11 case or what's going to be the newly severed case; whereas if they were together and there was at least an opportunity for a bit of an extension on discovery, they would be up to speed with everyone else and have the same opportunities to be involved with expert discovery and to be able to put in their positions on these policies and how they're going to be interpreted.

THE COURT: I am loath to get the 2009 case really dragged out. I think it would be sufficient for today's purposes to sever it, and then I'm going to direct everybody to meet and confer; and you are all going to be involved in

the mediation because everybody is doing the mediation.

That will apply because while it's severed, there's still the mediation agreement that's been entered into and there's still the discovery order that I've entered in that case that will be equally applicable to the severed claims. You know, there's not going to be any difference there.

So fact discovery for these -- on the 2011 cases -- and I'm not quite sure if I sever it I can still keep them in the same case, and it just would be that they will be tried separately. I'm a little bit uncertain about that. I was trying to look at some of the applicable case law and I wasn't getting a definitive answer. Does anybody have any knowledge on that?

MS. CLEMENTS: I would be willing to submit briefs on that if you would prefer we get it in the form of a motion.

THE COURT: I don't know if we need to create a separate case, but they will definitely be separate, so they will not be tried together; but I don't know if that means it's best to have a totally separate case with its own docket or we can continue apace on the same docket. But we have -- at least have those time frames.

So I would suggest that you meet and confer over these issues with respect to the 2009 litigation and what I'll call now the severed claims to see how those should be dealt with in terms of the time frame; and if there's any way to

accelerate, then maybe you don't need to go until the end of May. Maybe you can accomplish that within 60 or 90 days, given everything that's taken place. But I think you should meet and confer on that and I'll set a conference call date for us to reconvene on that.

But now I haven't heard from New Hampshire or HDI-Gerling on their motions that have been filed in the 2011 case; but I think the Court's decision with respect to Faraday and General Star matters are -- because that was a closer case, it's less close with the other Defendants because they hadn't filed suit in England until after these claims were filed here. And whether they were filed in the 2011 case or there had been a filing in the 2009 case, they still came later, so that's a little different.

MS. CLEMENTS: Your Honor, as to -- I believe all of them except for HDI-Gerling, this is what they typically refer to as a first known DJ. The DJ is the first notice they're getting of these claims. Now, this puts them in a different position as to when they could have filed, not having gotten notice until they were actually sued here. So to have that be held against them because they didn't file early, anticipating that there would be claims when they hadn't received a notice, is slightly problematic from their point of view.

MR. GREANEY: The DJ was manifesting not their first notice of a claims. We have been apprising them through

status reports periodically the status of the asbestos litigation, and we served them four months before they served us, so I don't know quite what the point is of Miss Clements's remarks.

MS. CLEMENTS: Your Honor, I've only seen on a distribution list one client named, and they had no other documents that put them on notice of these claims. And they can only file the English proceedings after they're given notice; and as far as my understanding is, that this DJ was that notice.

MR. GRESZLER: That certainly wasn't true of Faraday which hauled off and sued us in response to a preliminary status report and then kept silent about it for six months; so I don't think that's quite accurate.

MS. CLEMENTS: That certainly has nothing to do with the Portman action, QBE and Swiss Re.

THE COURT: Do you wish to be heard?

MS. CASSIDY: No.

THE COURT: For the same reasons that I've articulated on the report with respect to Faraday and General Star, the Court will deny the motions that have been filed. I will be entering a written order on this to explain more fully the reasons in addition to what I've already said on the record.

So at this stage those motions have been -- have now

been dealt with and we need to -- the only other thing that I thought might be helpful to deal with today was this motion to reconsider the order on the motion to seal the document. And this was filed by HDI-Gerling in the 2009 case, and it had to do with the -- it had to do with the information that was set forth on the record.

MS. CLEMENTS: That motion was filed under seal. I was not aware it was going to be addressed today and I was not able to get attachments to come through on a PDF. I have the motion itself, but I don't have the documents; and it also was filed under seal.

THE COURT: Okay. And maybe we can just set a time to hear that as well.

Now, we have the hearing on the sanctions coming up. Maybe we'll do it on that day.

MR. GREANEY: December 20th I think is the day?

THE COURT: Why don't we hear it that day? I think we'll just do it that way.

MS. CLEMENTS: Excellent.

THE COURT: Now, we need to do a conference call on the issues with respect to whether Howden Buffalo intends to proceed against Faraday and Gerling, and there should be some cooperative discovery so we can do that on an expedited basis; so why don't we set a call for January -- how about January the 18th at 4:30 p.m.?

MR. GREANEY: Fine with Howden, Your Honor.

MS. SNIDER: Fine with us as well.

THE COURT: Okay. That gives you not quite two months, about -- a little more than two months to see what kind of discovery you're able to get and see if you're in a position to make a decision, because -- and I would just put on the record I don't think that there had to be a firm decision today, the beginning of the case. You know, there's pleading in the alternative in our system, and -- but at some point there has to be a decision made, and I think the sooner that can be done, the better it will be.

I know that I'm not precluded from looking at General Star by the proceeding in England, but on the other hand if it's clear that that's what's going to be happening, it's going to be liquidated, there's no assets as a practical matter, I think it doesn't make any sense to continue to have them in as a party here, if the real party in interest is going to be Faraday, because they have the assets and they're recognized and they're taking those liabilities.

So we'll have a status call on that at that time. And then we'll be getting back together on the 20th on the issue of sanctions.

Is there anything else to come before the Court today?

MR. GREANEY: No, Your Honor, not for Howden.

MS. CLEMENTS: No. Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, at 3:25 p.m., the hearing was concluded.)

* * * * *

C E R T I F I C A T E

I, Shirley Ann Hall, certify that the foregoing is a correct transcript for the record of proceedings in the above-titled matter.

s/Shirley Ann Hall
Shirley Ann Hall, RDR, CRR
Official Court Reporter